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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARSON PIRIE SCOTT & CO.
Petitioner,
v.
WILLIAM M. LACEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GERARD C. SMETANA*
MICHAEL E. AVAKIAN
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

Attorney for Appellant

**Counsel of Record*

OF COUNSEL:
ROBERT J. KARTHOLL, JR.
Carson Pirie Scott & Co.
Division General Counsel
One South State Street
Chicago, Illinois 60603
(312) 641-8040

QUESTIONS PRESENTED

1. Whether Congress in enacting Title VII responded to a different history of disparate and unequal treatment not present under the Age Discrimination in Employment Act ("ADEA") which prohibits an inference of discrimination to remain in an age discrimination case after a bona fide business justification is raised by the employer.

2. Whether under the Court's McDonnell Douglas-Burdine burden of proof analysis developed under Title VII or the different language and legislative history of the ADEA, a directed verdict is required where the plaintiff's evidence presented fails to contest, meet, demonstrate pretext or rebut the employer's non-discriminatory business reason and fails directly or indirectly to demonstrate intent to discriminate by showing that age was a determining factor in management's decision.

3. Whether, as a matter of law under the ADEA, unlike Title VII, front pay can be awarded by a jury to a discharged employee from the date of trial in a given case until age 70, absent the trial judge first determining whether the equitable remedy of reinstatement is appropriate and if it is not, the duration for which an award of front pay should be allowed.

4. Whether, as a matter of law, mitigation of damages for back pay in an ADEA case, is properly a question for the judge where there is an uncontested record demonstrating that the employee failed to seek employment anywhere before trial.*

* Carson Pirie Scott & Co. is a corporation whose shares are publicly held.

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IN THE
SUPREME COURT OF THE UNITED STATES

CARSON PIRIE SCOTT & CO.

Petitioner,

v.

WILLIAM M. LACEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Carson Pirie Scott & Co. ("Carson") respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Memorandum Opinion and Judgment Order of the United States Court of Appeals for the Third Circuit are unreported and are reprinted in the Appendix hereto at pages A-1 and A-11, respectively. The order denying a timely petition

for rehearing and rehearing en banc is reprinted in the Appendix at page A-13, infra.

The memorandum Order of the United States District Court for the Western District of Pennsylvania (Diamond, J.) is unreported and reprinted in the Appendix hereto at page A-15 to A-20, infra.[1]

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 17, 1987 and a timely petition for rehearing was denied on January 19, 1988. The jurisdiction of this Court to review the judgment of the Third Circuit is invoked pursuant to 28 U.S.C. §1254(1).

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[1]The fact that the challenged Third Circuit decision is unpublished should carry no weight in the Court's decision to review the case. See Commissioner of Internal Revenue v. McCoy, 108 S.Ct. 217, 219 (1987) (court of appeals exceeded jurisdiction regardless of non-publication or lack of precedential effect of a non-published ruling). Petitioner has requested that the instant case be published.

STATUTES INVOLVED

Portions of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., are involved in this case. The pertinent text of these provisions are set out in the Appendix at A-21.

STATEMENT OF THE CASE

This case involves the important question whether, as the Third Circuit has presumed, the policy and practices of discrimination the Congress sought to eradicate in the ADEA are entitled to precisely the same methodology of analysis as established for acts of race, sex and national origin discrimination under Title VII in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 2148 (1981).

1. Under the ADEA, Congress expressly provided, however, that a business justification overcomes any inherent suspicion for which special inferences from the prima facie case can overcome an

employer's unrebutted evidence in the third step of the burden of proof analysis, unlike Title VII. Carson established a record and appealed on this question below. Related issues are also currently pending before the Court from the Third Circuit in the writ of certiorari granted to the employer petition in Harbison-Walker Refractories v. Brieck, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-271), and the petition recently filed in Westinghouse Electric Corp. v. Bhaya, 56 U.S.L.W. 3627 (February 29, 1988) (No. 87-1448).[2]

2. In the present case, the employee

[2]Because of the changes in business and restructuring of this nation's corporations which are presently occurring, the nature of Carson's argument that fundamental differences between Title VII and the ADEA exist, compel the Court's consideration. All ADEA cases are either tried or settled, therefore the issue to be decided in Harbison-Walker v. Brieck will not be dispositive in jury cases and the statutory construction issue was not raised below in Westinghouse Electric Corp. v. Bhaya.

repeatedly could and did not meet the company's performance goals and job instructions set for his territory by Carson, which was the reason for respondent's discharge. The plaintiff's case begins and ends with his own testimony of receiving a company sales plaque as evidence he was a good salesman and that he could sell a lot of flooring; but in his case in chief, he presented no testimony to contest the virtual lack of commercial sales in his Allegheny County territory. The sales plaque he relied upon was given to any Carson salesman selling one million dollars of carpet. Seventy-seven percent of Carson's salesmen have received the plaque (J.A. 376), yet respondent Lacey ranked 26th of 52 salesmen nationwide in 1980 and 21st of 23 salesmen when he was discharged in 1981. (J.A. 755, 858-59).

Lacey, however, submitted no rebuttal

evidence or witnesses to discredit the reasons Carson Executive Vice-President McKinney articulated at trial he considered in deciding to terminate him. Lacey had the opportunity to present evidence that the carpet business was in fact not good in Pittsburgh or that Carson's documentary evidence that Pittsburgh's demographics in relation to its experience in other cities was a pretextual basis for establishing sales goals. He could have tried to show that the demands made on him were unique or that Carson did not terminate salesmen who could not meet the company's sales objectives.

The district court denied a directed verdict to Carson at the close of its case (because no rebuttal was offered), admitting that Carson had "certainly produced" a non-discriminatory reason which satisfied its burden of proof, (J.A. 434), and

admitting all Lacey had was a "bare bones" prima facie case. (J.A. 444). "And, if that is fatal, then the Circuit will have at least this Court's evaluation that, initially, it was bare bones." (J.A. 444). See App. at 3.[3]

3. Petitioner Carson Pirie Scott & Co. ("Carson") employed plaintiff Lacey as a flooring salesman at its Pittsburgh, Pennsylvania office. Lacey was responsible for selling commercial carpet to office buildings and residential carpet products to retail outlets in Allegheny County. During the entire period of plaintiff's employment, the Allegheny County sales district continuously lost money and was lagging behind Carson's expectations for such a large metropolitan area. Sales of resilient flooring was

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[3]Most importantly, Lacey rested after plaintiff's business justification defense--having thus failed to introduce rebuttal evidence at any time during trial.

"J.A." references are to the Joint Appendices filed with the appeal of the case in the United States Court of Appeals for the Third Circuit. "App." references are to the attached appendix of this petition.

twice the amount of carpet sales, yet the historic relationship between carpet and resilient sales should have been a 3:1 ratio in the reverse. (J.A. 352-54, 505). Carson's management made a business decision how to overcome the differential by laying out guidelines for all its salesmen and warning them all up front in 1980 of the consequences if they failed to follow the program. (J.A. 523). Lacey, however, called Carson's goals for him "a joke." (J.A. 205). He also believed that Carson's sales program was not good business. (J.A. 218, 527).

Carson's National Sales Program required that salesmen visit architects, builders and developers for commercial flooring and buyers and store owners for residential flooring. The program relied upon the installation of carpet sample racks in retail stores to provide high visibility to consumers. The sales

program was proven by Carson to increase sales, but it also required that salesmen regularly follow-up with the retail buyers, (J.A. 42-43, 398), and not the floor salesmen. (J.A. 238).[4]

In January 1981, respondent Lacey was sent an "emphatic" letter by National Sales Manager McDonnell to ensure that Carson's National Sales Program would, in fact, be adhered to in all areas with his accounts, which Carson had discovered he had not been doing. (Pl. Ex. 8). McDonnell later found that Lacey's large accounts which had been specifically assigned to him had still not been

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[4]Carson management determined that its problem was three-fold in Allegheny County: Lacey had to place sample racks at all his accounts, regularly call on commercial developers, and spend a substantial amount of his time with buyers at larger department stores (J.A. 529), rather than small store front outlets which was his preference. These reasons were derived from eighteen months of direct field supervision of Lacey which proved unfruitful. (J.A. 537-40).

serviced or contacted for long periods of time, he hadn't placed the number of sales racks in stores as expected, and his volume of commercial sales remained of little consequence even after he was counseled concerning it.

In May 1981, Carson's three Pittsburgh sales managers met with McDonnell and recommended terminating Lacey. McDonnell agreed to review the matter with Carson Executive Vice-President McKinney, who reluctantly made the termination decision on the basis that Lacey had failed to follow management's sales program to make a profit in Pittsburgh when its experience in carpet sales nationwide and national indicators showed otherwise. (J.A. 390).

The evidence also proved that there was a high turnover of salesmen in the Pittsburgh office, which even the Court of appeals obliquely acknowledged "was not

unusual." App. at 3. Lacey was completely unable to present direct evidence that the business reasons upon which McKinney relied were untrue or any direct evidence of a discriminatory intent based on his age.[5]

After his termination in May 1981, plaintiff Lacey never made up a resume (J.A. 180), sought out an employment agency, answered a single job advertisement (J.A. 176), and failed to apply for a single job (J.A. 176). He had been a salesman for 32 years before he began to work for Carson, (J.A. 56) yet he never sought any other position with competitors in the large Pittsburgh flooring market. Prior to August 1, 1981, his job search

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[5]Lacey introduced testimony that five years prior to his discharge, the sales manager at that time had once referred to salesmen in the Pittsburgh office as "over-the-hill." The district court found the statement "so attenuated by subsequent events and circumstances" it did not add to the prima facie case. (J.A. 444).

relied wholly upon talking with his friends and calls to mills in Georgia about availability of jobs with those firms for him in Pittsburgh. (J.A. 181). He had no health or mental conditions precluding his ability to work as a salesman, even at the time of trial (J.A. 57, 92, 180). There was no evidence of wilfulness. (J.A. 419).

After August 1, 1981, Lacey ceased all further efforts. This date coincides with the arrival of his first Social Security check, (J.A. 176-81), for Lacey had applied for Social Security in February 1981, prior to his termination, and received his last paycheck from Carson in July 1981 (J.A. 171).

Carson showed there were jobs locally available in the carpet industry as a Carson employee, discharged three months after Lacey, took a job with Pennsylvania Floor Coverings in Monroeville, PA at the

time Lacey's friends were allegedly telling him jobs were unavailable (J.A. 496).

As a matter of law, the district judge should have first determined that Lacey's half-hearted efforts up to August 1, 1981 did not constitute mitigation and then instructed the jury that, as a matter of law, it could not award either back pay or front pay from August 1, 1981 forward. The jury awarded $353,500.00, the full amount Lacey claimed for five years of back pay and four years of front pay to age 70 during his own testimony, including his own estimated medical and insurance expenses, which were not incurred.

4. On appeal, the Third Circuit ruled that the plaintiff "may meet his burden of proof either in his case in chief or by rebuttal evidence." App. at 6. Carson's argument that it was entitled to a directed verdict since Lacey failed

to proffer any evidence why his discharge was pretextual or a determinative factor in his discharge was rejected, because the Third Circuit had recently ruled that this is not a requirement for reaching a jury in an age case. Bhaya v. Westinghouse Electric Co., 832 F.2d 258 (3d Cir. 1987), cert. filed, No. 87-1448 (Feb. 29, 1988).[6] Here, the court of appeals held that it is sufficient,

> if his case in chief, included evidence sufficient to justify the jury in not accepting defendant's contentions. There is simply no requirement that a plaintiff bifurcate a case under the ADEA, although he may desire to do so.

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[6]In Bhaya, 832 F.2d at 216, the Third Circuit determined that the prima facie inference of discrimination permeates an Age case:

> The plaintiffs' evidence was adequate to support an inference, initially a presumption of discrimination. When the defendant produced evidence of a nondiscriminatory reason, the presumption dropped from the case. A permissible inference remained, however, to create an issue of fact. (emphasis in original)

Thus, because the district judge initially decided that plaintiff did establish a "bare bones" prima facie case at the end of his case in chief (J.A. 444), this was sufficient to create an issue of fact for the jury to decide by drawing "reasonable inferences from the evidence." App. at 6.

The court of appeals also took explicit exception to petitioner's legal question that the jury could be allowed to enter a verdict for future loss of earnings in the case, without the trial judge making the initial determination that reinstatement was not possible and simply leaving it to the jury to decide whether or not to award an amount. Consequently, it rejected the logic of the recent Second Circuit decision in Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987), which "rejected our contrary precedent in Maxfield [v.

Sinclair International, 766 F.2d 788 (3rd Cir. 1985)]. Of course, we do not." App. at 8.

The court of appeals also rejected Carson's argument that the plain facts demonstrate Lacey's complete failure in his duty to mitigate damages and thus is barred from recovery, because "[t]he jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings." App. at 7.

The questions presented from these facts raise serious issues concerning the burden of proof in ADEA cases, as well as an express disagreement in the circuit courts of appeal on the related, but equally important authority of a federal court to award front pay, and what minimum efforts legally qualify as attempts to mitigate damages.

REASONS FOR GRANTING THE WRIT

Consistent with the legislative

history of the ADEA and because the ADEA specifically provides that production of a justifiable business reason bars the finding of a violation, the employee must produce affirmative evidence that the business reason is untrue or that age played a determinative role in his discharge. Each circuit has considered cases arising under the ADEA in this special manner. Since Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), however, the Third Circuit has developed a body of law greatly expanding employer liability at odds with the statute's intent. According to the Third Circuit, all prima facie cases reach the jury because the jury can disbelieve the witnesses.

This Court recently granted the petition for writ of certiorari in Harbison-Walker Refractories v. Brieck, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-

271), to consider the correctness of the Third Circuit's test as applied to summary judgments. However, that circuit has also set itself expressly in conflict with the equally important legal question that the equitable exercise of awarding front pay, as followed in other Circuits, is reserved for the court, not a jury. Even if petitioner is correct on its first question, the front pay question will not be decided in Brieck and it has not otherwise been questioned under Title VII because there is no right to a jury trial in those cases.

The case at bar embodies these legal conflicts in a set of clear facts typical of any discharge by an employer where the employee is not doing his job and the case reaches the jury. Without clarification by this Court of the important legal issues presented in this case and arising under the ADEA necessary to ensure

uniformity of law in the lower federal courts, Congress could be caused to reconsider the legislation.

I.

THE DECISION OF THE THIRD CIRCUIT CREATES A CLEAR BREAK WITH THIS COURT'S LIBERTY LOBBY AND BURDINE BURDEN OF PROOF DECISIONS THAT WILL PRECIPITATE CONSIDERABLE JURY LITIGATION UNDER THE ADEA TO SECOND GUESS AN EMPLOYER'S EMPLOYMENT DECISIONS

A. THE DECISION BELOW DEPARTS FROM THE EVIDENTIARY BURDEN ESTABLISHED FOR THE PLAINTIFF AT THE CONCLUSION OF THE EMPLOYER'S PRODUCTION OF A BUSINESS REASON UNDER THE ADEA

The court of appeals gave short shrift to this case because it believed the inference of discrimination decided in Bhaya v. Westinghouse Electric Corp., 832 F.2d 258 (3d Cir. 1987), cert. filed, 56 U.S.L.W. 3627 (February 29, 1988)(No. 87-1448), five weeks earlier, was controlling. In Bhaya, the Third Circuit determined first, that an inference of discrimination from the prima facie case is not dispelled by the introduction of a

legitimate employer business reason, and second, that a jury can infer discrimination from the prima facie case and thereby credit or discredit witness testimony "where the only evidence of intent is oral testimony." Bhaya, 832 F.2d at 262.

Given the nature of age discrimination, there must be some independent evidence to refute the employer's business rationale; the employee's testimony that he is a good worker cannot alone be enough to establish a case of discrimination. The employee must be required to create an issue of fact out of the employer's reasons, especially since the ADEA provides that it is a lawful business practice for an employer to discharge an employee for "good cause", 29 U.S.C. §623(f)(3), and based on "reasonable factors other than age." 29 U.S.C. §623(f)(1).

The Third Circuit, however, has

determined it permissible for the jury to second guess an employer's business judgment as, in its view, the jury is entitled to draw reasonable inferences from the evidence "notwithstanding that an opposing party has presented direct contrary evidence." App. at 6-7[7]. Just being in the protected class, the Third Circuit suggests, is enough to allow argument ~~to~~ a jury that the employee's witnesses should not be credited. The district judge, however, verbalized the

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[7]This court granted certiorari to test the Third Circuit's standard in a parallel decision involving summary judgment cases. The question presented in Harbison-Walker Refractories v. Brieck, 624 F.Supp. 363 (W.D. Pa. 1985), rev'd mem., 822 F.2d 52 (3d Cir. 1987), cert. granted, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-271), is whether a plaintiff who alleges intentional age discrimination can survive summary judgment merely by questioning the employer's business judgment without presenting direct or indirect evidence that the judgment in fact was motivated by intent to discriminate. The case at bar is ripe to consider the corollary of the Burdine test in ADEA cases reaching a jury.

lack of direction being experienced in the trial courts concerning this issue when he exclaimed that since all that has been presented is a "bare bones" case, if that "is fatal, then the Circuit will have at least this Court's evaluation...." (J.A. 444).

The requirement that the plaintiff produce affirmative evidence of age discrimination is consistent with the Court's recent explication in Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514 (1986), a case also discussing directed verdict standards, that "'discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion.' Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." (emphasis added). "The mere scintilla of evidence in support of the plaintiff's position will be insuffi-

cient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict based upon evidence that the employer's reason is untrue." 106 S.Ct. at 2512.

To meet his burden to prove a case of intentional age discrimination, a plaintiff must prove pretext through a preponderance of the evidence by specifically showing or at least contesting that the underlying facts of the employer's explanation are a cover for discrimination. Irvin v. Arco Carbide, 837 F.2d 724, 726 (6th Cir. 1987) ("disputation of the business reason...is not sufficient to carry the burden"); Elliot v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983) (burden "not dis-

charged by general avowals of belief, however sincere, that age--rather than an established adequate reason--was the real reason for the termination"), cert denied, 467 U.S. 1215 (1984). Therefore, a plaintiff "cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason." Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987).

Because a violation is not established by testimony showing an unwise business decision, ill will or even arbitrary action, the circuit courts of appeal have required that age be the "determining factor" in the discharge. Gray v. New England Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409 (7th Cir. 1984); Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1316 (9th Cir. 1982), cert denied,

459 U.S. 859 (1982). The Seventh Circuit explained in Bechold v. IGW Systems, Inc., 817 F.2d 1282, 1285 (7th Cir. 1987), that the employee's burden is to show the employer's reason had no basis in fact, did not actually motivate his discharge or that the reasons were insufficient to motivate a discharge. This requirement has been consistently adhered to in all circuits, but the Third.

B. THE DECISION BELOW CONTRAVENES THE ADEA BY ALLOWING A CASE TO REACH A JURY SOLELY ON A PRESUMPTION OF DISCRIMINATION WHICH CONTRAVENES THIS COURT'S STANDARDS EVEN UNDER TITLE VII

The logic of this evidentiary progression set out above is consistent with Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), where this Court analyzed the legal standards for evaluating the shifting burdens of proof in cases arising under Title VII. The Court affirmed in

both cases that the evidentiary burden of persuasion never shifts to the employer, even though decisions based on race, sex or national origin are invidious in nature and may initially entitle a plaintiff to a presumption of discrimination. Once the plaintiff asserts a prima facie case, however, only the burden of production shifts to the employer to articulate a nondiscriminatory reason for discharge.

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,[10] and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Burdine, 450 U.S. at 256-57 (emphasis added).

In footnote 10 of Burdine, the Court explained that "[a] satisfactory explanation by the defendant destroys the legally

mandatory inference of discrimination arising from the plaintiff's initial evidence." In Furnco 438 U.S. at 578, the Court specifically states: "[t]o dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate non-discriminatory reason for the employee's rejection.'" (emphasis in original).[8] But in Bhaya, 832 F.2d at 262-63, the Third Circuit propounded that the "jury can infer" discrimination from the prima facie case and therefore these inferences "together with testimony..." rebut the proffered explanation by the defendant without proving age was a

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[8]In this case, the court of appeals does not contend that respondent Lacey discredited Carson's explanation through effective cross-examination of its witnesses or that Lacey presented any evidence he was treated differently from any other Carson employees. Neither did it suggest that having done so, combined with a particularly compelling case, he met the ultimate burden of proof.

motivating factor or establishing what fixed characteristic of age allows a presumption of invidiousness, which may be proper for decisions based on race, sex, or national origin.

In Burdine, because it "would require the defendant to introduce evidence, which, in the absence of any evidence of pretext, would persuade the trier of fact that the employment action was lawful, this Court found the Fifth Circuit erred. This exceeds what properly can be demanded to satisfy a burden of production." 450 U.S. at 257 (emphasis in original).[9]

Consistent with this Court's view that affirmative evidence directed at the employer's explanation is required, the Court was able to explain that due to the

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[9]Moreover, once the presumption of the prima facie case is dispelled by defendant, evidence of a pretextual reason for discharge does not revive that presumption. Sims v. Cleland, 813 F.2d 790, 793 (6th Cir. 1987).

employer's natural incentive to persuade the jury and the employee's opportunity for discovery under the Federal Rules of Civil Procedure, including any EEOC file, "we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." Burdine, 450 U.S. at 258 (emphasis added). The reasoning of the Third Circuit that a jury verdict should be allowed to stand because a jury might disbelieve the employer's explanation creates a clear conflict with the Anderson requirement that a party opposing a motion for summary judgment, directed verdict (or motion for j.n.o.v.) come forward with affirmative evidence in support of his position that disclaims the employer's justification.

At bar, Lacey never disproved that his sales performance was sufficient for Carson's business or that he aggressively

pushed Carson's national sales program.[10] The reasoning that there continues a "permissible inference" of discrimination which can substitute for a factual submission of pretext evidence is at odds with the "determinative factor" test and Burdine. An ADEA case cannot be decided on prima facie facts standing unconnected to direct or indirect evidence of pretext which the Third Circuit in Bhaya approved and which has no legal support.

II

THE DECISION BELOW ERRONEOUSLY CREATED PERMISSIBLE INFERENCES TO ARISE UNDER THE ADEA AND TITLE VII IN A LIKE MANNER WHEN THE LEGISLATIVE HISTORY OF THE DISCRIMINATION INTENDED TO BE ELIMINATED WERE DETERMINED BY CONGRESS TO BE DISSIMILAR

Since Congress statutorily affirmed

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[10]The instant case grows out of a line of cases by which the Third Circuit, before and since Anderson v. Liberty Lobby, has permitted an ADEA plaintiff to prevail by means of indirect proof. Chipollini v. Spencer Gifts, Inc. 814 F.2d 893, 898 (3d Cir. 1987); Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 205 (3d Cir. 1987); Grahm v. F.B. Leopold Co., Inc., 779 F.2d 170 (3d Cir. 1985).

that employers are not prohibited from differentiating between workers "based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), the plaintiff must direct his case to disproving those factors with evidence. Plaintiff Lacey's failure to rebut Carson's evidence that he was discharged for not meeting Carson's critical need for greater sales in Allegheny County, failed to meet his required burden of proof, thereby entitling Carson to a directed verdict.

The Third Circuit's view, however, is that a jury is entitled to decide that an employer acted on the basis of age because the absence of evidence "directly impugning the nondiscriminatory reason'" is unnecessary inasmuch as "indirect evidence, if credited, raises an inference of discrimination" that allows a jury to discredit the testimony. Bhaya, 832 F.2d 258, 262 (3d Cir. 1987), or that the

employer could, perhaps, have made a different business decision.[11] Yet, in Burdine, 450 U.S. at 259, the Court stated that the ADEA "was not intended to 'diminish traditional management prerogatives,'" (quoting United Steelworkers of America v. Weber, 443 U.S. 193, 207 (1979))

A strong presumption or suspicion of invidious discrimination is not justified in an ADEA case and therefore the courts should not evaluate a claim of pretext in precisely the same manner as Title VII. In Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (citations omitted), the Court noted that,

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[11] In Bhaya, 832 F.2d at 262, the court of appeals credited the plaintiff's expert's testimony that bargaining unit work was not "as readily" transferred to other employees than it could have been to the plaintiffs. The suggestion that alternative actions could have been chosen challenges the employer's business judgment which is not allowed under the ADEA, but may be under Title VII.

> [W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities... . [O]ld age does not define a "discrete and insular" group, in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span.

See also Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977), Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (no automatic presumptions whenever a worker is replaced by another of a different age). This is also simply inferred from the purpose expressed by Congress in §1 of the statute, 29 U.S.C. §621.

Circuit Judge Arlin Adams particularly explained in dissent in Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1401 (3d Cir. 1984), how the weaker

presumption of bias in age cases exists relative to race or sex discrimination cases. When an employer's decision is based on performance, "the claimant's rebuttal evidence of pretext should be evaluated with greater care than in a Title VII action. Our intuitive understanding of bigotry supports an inference of pretext from virtually any defect in an employer's explanation of a decision to disfavor a member of a Title VII protected class. I do not think we should be as quick to infer pretext in an ADEA proceeding." [12]

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[12] In Duffy and other similar cases where evidence of pretext is proffered, each case has independent direct evidence of discriminatory intent. In Duffy, company personnel testified at variance and a discriminatory remark "we are looking for younger men" was made. In Grahm v. F.B. Leopold Co., Inc., 779 F.2d 170 (3d Cir. 1985), the plaintiff was told he was "dog meat." These distinguishing facts of animus are not present here. Without such direct evidence to bolster a prima facie case, a plaintiff cannot establish pretext from the prima facie case alone.

The ADEA is clearly a hybrid statute reflecting Congress' desire to eliminate employment practices similar to those prohibited in Title VII. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). Unlike Title VII, however, the enforcement mechanisms of the ADEA are found in the Fair Labor Standards Act, revealing significant differences in remedial and procedural provisions of the two statutes. Lorillard v. Pons, 434 U.S. 573, 584 (1978); 29 U.S.C. §626(b). In addition, the ADEA expressly provides for good faith defense of reliance on agency interpretations and business reasons. 29 U.S.C. §§626 (e)(1)(f)(1). Accordingly, there is a distinction in the different approaches Congress chose in the two acts between the immutable characteristics of race, sex and national origin which might lead to invidious discrimination and discrimination based on relative age differentials

that the ADEA seeks to overcome. See Laugesen v. Anaconda Co., 510 F.2d 307, 312 n. 4 (6th Cir. 1975).

Furthermore, the court itself has been careful to recognize the distinction between the presumptions underlying the ADEA and has questioned applying the evidentiary burdens wholesale from Title VII. "[I]n enacting the ADEA Congress exhibited both a detailed knowledge of the FLSA provisions and their willingness to depart from those provisions regarded as undesirable for incorporation." Lorillard, 474 U.S. at 581; TWA, Inc. v. Thurston, 469 U.S. 111, 125 (1985) ("Congress declined to incorporate several FLSA sections" such as criminal provisions and changed the standard for liquidated damages). Rather, Congress chose to place the ADEA under the standards for relief of the Fair Labor Standards Act.

By enacting the ADEA, Congress did

not authorize juries to substitute their view of how a business should be run. Furnco, 438 U.S. at 577-78. An employer is entitled to make both good and poor employment decisions and the jury is not to sit as a "super-personnel department" to oversee personnel decisions. Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986), cert. denied, 107 S.Ct. 959 (1987). A business must be allowed to terminate marginal employees, especially when the business is unprofitable. In the case at bar, there is no testimony that "the legitimate reasons offered by defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253.

Accordingly, in evaluating whether evidence exists which is legally sufficient to show a pretext for discrimination, there can be no remaining inferences of discrimination after an employer has

produced a nondiscriminatory business reason for its action. The nature of the ADEA plaintiff's evidence must counter the correctness of the specific evidence introduced by the employer to show it is untrue and lacks a "factual basis." Burdine, 450 U.S. at 258.

As Judge Adams prophesied in Grahm v. F.B. Leopold Co., 779 F.2d 170, 175 (3d Cir. 1985), "[i]f courts strain to find snippets of evidence to support highly questionable inferences of discriminatory conduct they not only will unduly hobble necessary restructuring by hard-pressed industries, but eventually cause Congress to reconsider the controlling legislation." The panel's unexplained switch in the burden of proof and wholesale importation of Title VII law in ADEA cases under the guise of allowing permissible jury inferences from the evidence, requires the court to grant this petition to secure

uniformity of decisions in at least the Third Circuit and to settle the matter of proofs in the remaining circuits.[13]

III

THE THIRD CIRCUIT ESTABLISHED A CLEAR CONFLICT WITH THE SECOND CIRCUIT DECISION IN DOMINIC V. CONSOLIDATED EDISON THAT 1) A JURY CAN DECIDE WHETHER OR NOT TO AWARD FRONT PAY AND 2) TO AWARD FRONT PAY FOR AN INDETERMINATE PERIOD OF TIME. BOTH ACTIONS THE SECOND CIRCUIT CORRECTLY DETERMINED ARE DECISIONS RESERVED FOR THE EQUITY JURISDICTION OF THE DISTRICT JUDGE.

The trial judge failed to determine that Lacey could not be reinstated as a carpet salesman by Carson prior to allowing all issues of front pay to be

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[13]The growth rate in cases under the ADEA is reflected in the burgeoning caseload of the district courts. In 1983, there were 4,981 labor cases in litigation excluding matters under the FLSA, LMRA, LMRDA and RLA. In 1987 there were 7,452 cases comprising this category. Table C-2A, U.S. District Courts Civil Cases, June 30, 1983 thru 1987, Annual Report of the Director of the Administrative Office of the U.S. Courts, Appendix 2 at §3 (June 30, 1987). A 3.7% increase is reported for 1986-87 in this "other labor" area and a 4.5% increase in FLSA litigation for the same period.

decided by the jury. The procedure followed in this case and affirmed by the Third Circuit is directly contrary to the decision of the Second Circuit in Dominic v. Consolidated Edison Co., 822 F.2d 1249 (2d Cir. 1987).

In Dominic, the Second Circuit determined that the "decision whether to award front pay in lieu of reinstatement is an equitable one entrusted to the trial judge" as well as the size of an award. Dominic, 822 F.2d at 1257. The nature of this approach follows from the ADEA itself, since 29 U.S.C. §626(c)(2) provides for trial by jury "of any issue of fact in any such action for recovery of amounts owing as a result of a violation, regardless of whether equitable relief is sought by any party in such action." "Amounts owing" then, do not relate to "issues concerning equitable relief [and] are not to be tried by a jury." Id.

The Second Circuit determined that this interpretation of the FLSA also flows from the legislative history of the Act since the House Conference Report identifies "amounts owing" as "items of pecuniary loss such as wages, firing, and other job-related benefits" and liquidated damages. H.R. Conf. Rep. No. 950, 95th Cong. 2d Sess. at 13-14, reprinted in 1978 U.S. Code Cong. & Admin. News 504, 528, 535.

> The inference to be drawn from this legislative history is that Congress' intention was simply to comply with the seventh amendment by providing a jury trial of factual issues underlying such claims. There is no evidence that Congress intended to depart from the traditional distinction between legal and equitable claims embodied in the seventh amendment.

822 F.2d at 1257.

That interpretation is consistent with this Court's previous decisions in TWA v. Thurston 469 U.S. 111, 125 (1985), where the Court determined that the

remedial provisions of the ADEA and the FLSA "are not identical" and in Lorillard v. Pons, 434 U.S. 575, 583, 584 (1978), where the Court concluded two sharp distinctions between the enforcement and remedial schemes in contrast with Title VII. The Court did, however, make it clear that the "word 'legal' is a term of art" and the availability of "legal or equitable relief" under 29 U.S.C. §626(b), was as its normal meaning, meant by Congress "to refer to judgments enforcing....liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." Lorillard, 434 U.S. 583 n. 11. These items of recovery were to be "treated as actions for lost wages under the ADEA" the same as unpaid minimum wages and overtime are treated under the FLSA, Lorillard, 434 U.S. at 582.[14] Therefore,

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[14]The courts first developed front pay in Title VII as a remedy due to the (continued...)

jury trials were intended under the ADEA, but not under Title VII and back pay is a matter of equity under Title VII, but legal relief to be awarded under the ADEA. Id.

In fact, "[t]he vast majority of older workers who lose their jobs find new employment within a few months--many within a few weeks..." Report of the Secretary of Labor to Congress, The Older American Worker, at 81 (1965). Consequently, any presumption that front pay was to be a mandatory element of legal relief has no basis in the legislative history of the ADEA.

Other circuits, like the Second Circuit, have reserved front pay for the

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14(...continued)
invidious nature of race, sex or national origin discrimination, but to be awarded by a judge. The Third Circuit imported the front pay relief from Title VII to the ADEA without controlling its speculative nature through the trial judge's equitable exercise of discretion.

discretion of the trial judge holding that it is equitable relief. Castle v. Sangamo Weston Inc., 837 F.2d 1550, 1562 (11th Cir. 1988). "In deciding whether front pay is appropriate, we have noted that the district court in its discretion should consider the circumstances in each particular case, and should note such factors as whether: the plaintiff has a reasonable prospect of obtaining comparable employment; the time period for the award of front pay is relatively short; and whether liquidated damages have been awarded (and if so, in what amount)." Coston v. Plitt Theatres, 831 F.2d 1321, 1332 (7th Cir. 1987); Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985).

The Third Circuit in the present case has refused to accept these controls on front pay awards. Rather, it cited Maxfield v. Sinclair International, 766

F.2d 788 (3d Cir. 1985), for the proposition that "the court in the circumstances here could allow the jury to return a verdict for loss of future earnings instead of requiring reinstatement, provided the jury found, as it did, that plaintiff suffered such a loss and defendant was liable to him" and the court of appeals held that "there is no question but that in this circuit under Maxfield v. Sinclair International the court in the circumstances could allow the jury to return a verdict for loss of future earnings instead of requiring reinstatement..." App. at 7-8.[15] In Maxfield, the

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[15]The trial judge in this case instructed the jury that it must award front pay if it determined that Lacey was discharged because of his age: "This consists of wages and certain employee benefits Plaintiff would have received from the date the Defendant discharged him to the date of this trial and future wages to age 70 (J.A. 473).... The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the adverse

(continued...)

court bluntly held, "[o]f course the amount of damages awardable as front pay is a jury question," 766 F.2d at 796. No authority is given by the Maxfield court for this holding. The majority view is the better reasoned one.

Preserving this statutory distinction explained in Dominic, will serve as an important control over awards and ensure that the ADEA does not become a retirement plan of its own.[16] The monetary liability

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[15](...continued)
action, the date of the firing, to the date up to age 70." (J.A. 471) The judge made no preliminary decision that Lacey could not have been reinstated.

[16]In Dominic, plaintiff immediately acquired a new job, but at less pay. The trial court found that "an award of front pay that assumes that Dominic will stay in his present lower paying job and award him compensation for the difference between that job and what he would have earned at Con Ed until he reaches the age of 70 is highly speculative." 44 F.E.P. Cases 1865, 1869 (S.D.N.Y. 1986). Therefore, even though Con Ed failed to show that Dominic had not mitigated his damages, the failure "does not entitle him to lifetime front-pay award." 822 F.2d at 1258. "In
(continued...)

of front pay to employers, without control or court supervision, is so substantial under the ADEA that it warrants plenary review by this court.

Moreover, front pay is so highly speculative because the trial takes place at a fixed point in time where only the prior efforts of the plaintiff can be reviewed. This is a further reason why the award of front pay is not a jury question as there are no hard facts to be resolved in its deliberations. The situation is exacerbated by the enormous amount of ADEA litigation now pending in the federal courts.

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[16](...continued)
calculating the size of a front-pay award the court must estimate the plaintiff's ability to mitigate damages in the future." Id. Two years, not 18 years, was determined by the trial court to be sufficient.

IV

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT THAT THE DUTY TO MITIGATE DAMAGES REQUIRES REGULAR EFFORTS TO SEEK WORK AND APPLY FOR EMPLOYMENT PRIOR TO TRIAL WHICH ARE NOT MET IF A PLAINTIFF DOES NOT APPLY FOR A SINGLE JOB OR SEEK EMPLOYMENT ASSISTANCE

The rule requiring the mitigation of damages was eliminated in this case. It is the affirmative duty, as a matter of law, of an injured plaintiff to minimize his loss by seeking further employment. Even if he does not find suitable other employment, if he could have, his damages will be reduced as if he had. Thus, the issue of mitigation cannot be submitted to the jury in sham or deminimus cases where the plaintiff drops all efforts to seek work after two months (when his severance pay ended), but five years before trial.[17]

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[17] This case does not call into question whether Lacey could have been excused from seeking work because of poor economic conditions, because he did not

(continued...)

The uninterrupted policy of this court in remedying employment discrimination has been to resolve cases in favor of the "healthy policy of promoting production and employment", rather than through windfalls. Phelps Dodge Corp. v. NLRB 313 U.S. 177, 200 (1941). The failure of a discharged employee to make a reasonable search for interim employment constitutes an affirmative defense to back pay. NLRB v. Nickey Chevrolet, 493 F.2d 103 (7th Cir. 1974). The rule is fully supported by the Congressional statement of findings and purpose for the ADEA "to promote employment of older persons" and "to help employees and workers find ways of meeting problems arising from the impact of age on employment", 29 U.S.C. §621(b), "and especially to regain employment when

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17(...continued)
present such evidence. If he had, the speculative nature of projecting the front pay award would be even more closely focused due to lower commissions.

displaced from jobs." 29 U.S.C. §621(a)(1).

The decision concerning respondent William Lacey's mitigation efforts and other discharged employees emerging in the Third Circuit runs against the body of law well-established by this Court and in other circuits, namely, "whether public policy is best served by encouraging a skilled and healthy worker to remain idly unemployed for [nine years], or by encouraging him to obtain a job, comparable to his regular job in working conditions and wages, for the duration of the [] period." NLRB v. Madison Courier, Inc., 505 F.2d 391, 395 (D.C. Cir. 1974).

In Madison Courier, the court of appeals reviewed a situation where striking printers were seeking entitlement to back pay. None of the workers had accepted interim employment or comparable jobs outside the industry, registered with

the state employment agency, or made an individual application for other employment in the industry. Rather, the strikers relied on the union "grapevine" for jobs. The court of appeals held these efforts were not diligent and barred an award of back pay.

In the Title VII context, this court approved the corollary to the mitigation rule that after a reasonable period of time, the duty of mitigation requires an employee to accept employment even at a lower rate of pay if one equivalent to the former is unavailable. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n. 16 (1982); Madison Courier, 505 F.2d at 395 (he must "lower his sights"). This affirmative duty to be available for employment and to seek new employment is the rule in other circuits and is well reasoned. NLRB v. Southern Silk Mills, Inc., 242 F.2d 697 (6th Cir. 1956); cert denied, 355 U.S. 821

(1957); NLRB v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955). See Restatement (Second) of Contracts §347 (1981).

William Lacey testified he ceased all efforts to obtain work after he began to receive Social Security in 1981 (J.A. 176-81). Carson demonstrated at trial that jobs in the carpet industry were locally available which proved that Lacey's "losses [were] willfully incurred" and "clearly [an] unjustifiable refusal to take desirable new employment." Phelps Dodge, 313 U.S. at 198, 200. A complete failure to look for work cannot, as a matter of law, be a "reasonable search" or "honest good faith efforts" to NLRB v. Cushman Auto, 223 F.2d 832, 836 (1st Cir. 1955); Nickey Chevrolet, 493 F.2d at 108.

Moreover, Lacey's failure to even register with the State Employment Agency (J.A. 176, 180) should have been a showing of lack of reasonable diligence. Madison

Courier, supra; Burns & Sims, Inc., 157 N.L.R.B. 366, ent'd, 383 F.2d 987 (5th Cir. 1966). Accordingly, an absolute failure to continue to search for alternate employment, must be, as a matter of law, a failure to exercise the duty to mitigate damages which the trial court is obliged to determine. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

The court of appeals in the present case created a conflict in the circuits by its failure to apply a reasonable judicial check on the sufficiency of the mitigation evidence as "[t]he jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings." App. at 7. Yet, the uncontested testimony of respondent Lacey himself, as the court of appeals was well aware, was that he ceased all efforts to look for work the moment he received his first social security check and his severance

pay ended. To affirm a nine year award of front pay on what are, frankly, two months of meager employment inquiries, risks turning the remedial foundation of the ADEA into an early retirement act rather than a mechanism to "promote employment of older workers".

The Third Circuit view is also out of step with the decision in Anderson v. Liberty Lobby that the trial court in deciding whether or not to grant a directed verdict must, in fact, inquire whether there was a preponderance of evidence to support a verdict. 106 S.Ct. at 2512. The Third Circuit's utterly lax standard of review is clearly out of step with any principled application of the rule of mitigation. The decision erodes this Court's caselaw and thereby invites its correction.

CONCLUSION

The legislative history and language of the ADEA, as shown by Judge Adams in Duffy, demonstrate that permissible inferences of invidious discrimination which arise under Title VII do not similarly pervade an age case. To permit the court of appeals decision to stand will leave no room for preventing an employer's business decisions from coming under a jury's "second guess" evaluation as to its propriety, which Congress expressly chose not to allow. For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

Gerard C. Smetana*
Michael E. Avakian
Abramson & Fox
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

Attorney for Appellant

* Counsel of Record

OF COUNSEL:
Robert J. Kartholl, Jr.
Carson Pirie Scott & Co.
Division General Counsel
One South State Street
Chicago, Illinois 60603
(312) 641-8040

April 18, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3202

WILLIAM M. LACEY, an Indiv.

v.

CARSON-PIRIE SCOTT & CO., a corp.,

Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
Civil Action No. 83-772
District Judge: Honorable Gustave Diamond

Submitted Pursuant to Third Circuit Rule 12(6)
December 10, 1987

BEFORE: GREENBERG and SCIRICA, Circuit Judges, and POLLAK,* District Judge

(Filed December 17, 1987)

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

Plaintiff, William M. Lacey, brought this action against defendant, Carson-Pirie-Scott & Co., his former employer,

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

for wrongful termination, breach of an employment contract, diversion of sales commissions and violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 261, et seq. All of plaintiff's claims for relief were dismissed either before or at trial except for the claim under the ADEA which was submitted to the jury. Plaintiff recovered a verdict for $353,500, the full recovery he sought. Following the denial of defendant's motions for a new trial or a judgment n.o.v., it appealed.

Plaintiff, who was employed by defendant as a floor covering sales person in the Pittsburgh area, was terminated by defendant in May 1981 when he was 62 years old, allegedly because of his poor selling performance. On plaintiff's direct case he presented evidence that on occasion he had exceeded his sales quota and had received an award from defendant in

recognition of his efforts. Plaintiff was permitted to testify on damages as to his anticipated earnings through 1988, when he apparently intended to retire. Plaintiff also testified that he attempted to mitigate damages but was unable to do so.

Defendant presented evidence that plaintiff's age was never considered when it discharged him. It further attempted to prove that it frequently discharged employees, plaintiff's performance was poor and the procedure by which he was discharged was not unusual.

When defendant rested, the district judge asked plaintiff if he had rebuttal and received a negative answer. Defendant then moved for a directed verdict but was unsuccessful as the judge thought plaintiff had put in a prima facie "bare bones" case.

During the jury's deliberations, it sent a note to the judge asking when

defendant found out plaintiff's actual age, a question no doubt generated by the fact that plaintiff had misrepresented his age to defendant in his application for employment. Subsequently, the jury returned a verdict for the "full amount of settlement." The court then instructed the jury that if it intended to award money damages it had to do so with a dollar amount. The verdict for $353,500 was later delivered.

On this appeal defendant argues that it is entitled to a reversal because plaintiff failed to present rebuttal evidence and thus failed to establish that defendant's proffered reasons for his discharge were pretextual, plaintiff was not entitled to an inference that defendant's reasons for discharging him were pretextual, plaintiff failed to mitigate damages and the verdict improperly reflected speculation by the jury regard-

ing future lost earnings. Defendant further asserts that plaintiff's claim of entitlement to future lost earnings was an issue for the court.[1] Finally, defendant asserts that the jury was confused and disregarded the weight of the evidence.

This court recently reviewed the procedures for an action under the ADEA in Bhaya v. Westinghouse Electric Corporation, No. 87-1026, (3d Cir. Nov. 2, 1987), and we repeat them here. A plaintiff may recover only if he proves by a preponderance of the evidence that age was a determining factor in his termination and he may do this by direct or circumstantial evidence. If a plaintiff in his case meets this burden, the defendant, to avoid a motion for a directed verdict, must articulate and support by evidence a

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[1]Defendant does not assert that it asked for and was refused a charge discounting future earnings to current value.

legitimate, nondiscriminatory reason for its action. If the defendant does this, the plaintiff then has the burden to prove discriminatory animus in the defendant's actions, thus overcoming the defendant's claim of justification. The plaintiff, however, may meet his burden either in his case in chief or by rebuttal evidence.

It is apparent from the application of the principles restated in Bhaya that defendant's first two points are without merit. Plaintiff was not required to present rebuttal evidence if his case in chief included evidence sufficient to justify the jury in not accepting defendant's contentions. There is simply no requirement that a plaintiff bifurcate a case under the ADEA, although he may desire to do so. Further, in an ADEA case, as in any lawsuit, a jury is entitled to draw reasonable inferences from the evidence notwithstanding the fact

that an opposing party has presented direct contrary evidence.

We see no merit to defendant's contention that plaintiff failed to mitigate damages and thus is barred from relief for there was evidence that plaintiff attempted to find other employment but was unsuccessful. The jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings. See Maxfield v. Sinclair International, 766 F.2d 788, 795-96 (3d Cir. 1985), cert. denied, 106 S. Ct. 796 (1986). Further, there is no question but that in this circuit under Maxfield v. Sinclair International the court in the circumstances here could allow the jury to return a verdict for loss of future earnings instead of requiring reinstatement, provided the jury found, as it did, that plaintiff suffered such a loss and defendant was liable to

him. While defendant cites Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987), for the proposition that such an award is within the discretion of the court, it acknowledges that the Dominic court rejected our contrary precedent in Maxfield. Of course, we do not.

In addition, there is no basis to order a new trial because of jury confusion. While defendant suggests the jury may have awarded a verdict to plaintiff because defendant discharged him for misstating his age to defendant, it is no less likely that the jury may have considered the time of defendant's knowledge of plaintiff's age to be germane because it gave defendant a reason, albeit an unlawful one, to terminate plaintiff. Further, the attempt to return a verdict for the full amount of the settlement was undoubtedly, as the trial judge thought

was likely, merely an indication that the jury accepted plaintiff's figures in their entirety.

In view of the aforesaid, the judgment entered on the jury verdict on August 21, 1986 and the order of March 11, 1987 denying defendant's motions for a new trial and judgment n.o.v. will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3202

WILLIAM M. LACEY, an Indiv.

v.

CARSON-PIRIE SCOTT & CO., a corp.,

Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
Civil Action No. 83-772
District Judge: Honorable Gustave Diamond

BEFORE: GREENBERG and SCIRICA, Circuit Judges, and POLLAK,* District Judge

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania, and was submitted under Third Circuit Rule 12(6) on December 10, 1987.

On consideration whereof, it is now

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

here ordered and adjudged by this court that the judgment of the District Court entered on August 21, 1986, and the order on defendant's motions for a new trial and judgment n.o.v. entered on March 11, 1987, be and the same are hereby affirmed.

Costs shall be taxed against appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: December 17, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3202

WILLIAM M. LACEY, an Indiv.

v.

CARSON-PIRIE SCOTT & CO., a corp.,

Appellant

D.C. Civ. No. 83-772

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges, and POLLAK,* District Judge

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

*The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Morton I. Greenberg
Circuit Judge

Dated: January 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM M. LACEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-772
CARSON PIRIE SCOTT & CO.,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

AND NOW, this 11th day of March, 1987, defendant having filed a motion for new trial pursuant to Fed.R.Civ.P. 59(a) and a motion of judgment n.o.v. pursuant to Fed.R.Civ.P. 50(b), plaintiff having responded to said motions, and the court having given the matter due consideration, IT IS ORDERED that said motions be, and the same hereby are, denied for the following reasons.

1) Defendant maintains that the verdict was excessive because the court improperly permitted the plaintiff to testify regarding future increases in salary, commission or benefits. Specifi-

cally, the defendant, citing Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982), argues that salary increases may be recovered under the ADEA only if the likelihood of such patterns of increases, or similar evidence. Id. at 873. (emphasis added). However, in the case at bar, the evidence in fact was that over a seven year period the company systematically increased plaintiff's sales quota by 9% and that the plaintiff met or exceeded the 9% increase in each year, and that this resulted in proportionate increases in plaintiff's earnings. There was, therefore, sufficient evidence of patterns of past increases in increases to obviate the need for expert testimony regarding future increases in salary.

2) The defendant further contends that the verdict was excessive because the court erred when it refused to instruct the jury that no amount could be included

in an award in plaintiff's favor for health and medical benefits because there was no evidence that plaintiff had either purchased substitute health or medical insurance or paid any medical expenses which would have been covered by defendant's medical benefit plan. Defendant, however, did not make a specific objection to the charge and, therefore, may not assign as error the failure to give the instruction. Mazer v. Lipschutz, 327 F.2d 42, 51 (3d Cir. 1964); Harkins v. Ford Motor Co., 437 F.2d 276 (3d Cir. 1970). This is not similar to Bowley v. Stotler and Co., 751 F.2d 641 (3d Cir. 1985), because in the case at bar the court never made any comment which would entitle counsel to assume that he need not renew his objections already ruled upon.

In any event, we believe that the defendant is not entitled to relief on the merits. While the issue of recovery of

health benefits has not been addressed by the Third Circuit, and there is a split of authority among the courts which have addressed the issue, see Bonura v. Chase Manhattan Bank, N.A., 629 F.Supp. 353 (S.D.N.Y. 1986), we believe that the approach taken in Jacobsen v. Pitman-Moore, Inc., 582 F.Supp. 169 (D.Minn. 1984), is the correct method for calculating the loss of these benefits. In that case the court held: "The United States Court of Appeals for the Eighth Circuit in Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974), stated that pursuant to 29 U.S.C. §626(b), the plaintiff in an age discrimination case should recover his or her salary and other specific monetary benefits. The insurance benefits plaintiff lost are not any less of a monetary benefit to her because she could not afford to replace her insurance benefits or because she did not become

sick." Jacobsen, 582 F.Supp. at 179. See also Blackwell v. Sun Electric Corp., 696 F.2d 1176 (6th Cir. 1983).

Finally, we note that the jury awarded the plaintiff $353,000.00, $19,500.00 of which represents an award for the loss of insurance benefits. At best, the appropriate relief would be a remittitur rather than a new trial. See generally 11 Wright and Miller, Federal Practice and Procedure §2815.

3) The defendant next argues that the court erred by not giving binding instructions to the jury that plaintiff was discharged for the legitimate non-discriminatory reason that he was unable to develop what defendant believed was the sales potential of the Allegheny County sales territory. We believe that defendant's position is meritless. Again, the defendant failed to make any objection to the charge and, therefore, waived the

right to raise the issue. Fed.R.Civ.P. 51. Second, the matter was for the jury, and as defendant concedes, the court had similar language in its charge.

4) Finally, we conclude that viewing the evidence in a light most favorable to the plaintiff there is no basis on which to grant defendant's motion for judgment n.o.v.

/s/ Gustave Diamond
United States District Judge

AGE DISCRIMINATION IN EMPLOYMENT ACT

§621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and

growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(f) Lawful practices; age and occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a

bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retire-

ment of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Supreme Court, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1731

In The
Supreme Court of the United States
October Term, 1987

—o—

CARSON PIRIE SCOTT AND COMPANY,
Petitioner,

v.

WILLIAM M. LACEY,
Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

DENNIS J. CLARK
The Colonial Building
205 Ross Streeet
Pittsburgh, PA 15219
(412) 391-7686

NORMAN G. HAYWOOD
1705 St. James Place
Wexford, PA 15090
(412) 935-5499

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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STATEMENT OF THE CASE

William M. Lacey ("Lacey") was a salesman for approximately 32 years before being hired by Carson Pirie Scott ("Carson") on November 1, 1974 (Joint Appendix, hereafter referred to as "J.A.", 56-57). The retirement age at Carson was 70 years of age, and Lacey did intend to work until he reached 70 (J.A., 57). At the point of his dismissal on May 16, 1981, he was 62½ years of age (J.A., 57-58).

Lacey's income from 1974 through 1981 (J.A., 60-61; see also Plaintiff's Exhibit 37 at J.A., 781) was as follows:

1976—$ 10,857.88	1979—$ 22,926.43
1977—$ 14,764.44	1980—$ 28,136.32
1978—$ 19,117.37	1981—$ 13,367.53

From 1976 through 1980, Lacey exceeded his sales quota (J.A., 60-62, 110). Sales quotas were established by Carson's headquarters in Chicago, and salesmen were informed in writing (J.A., 61, 345). Quotas were based on the previous year's performance plus a 9% increase (J.A., 86, 114-115, and see e.g. Plaintiff's Exhibit 17 at J.A., 749).

Lacey's gross sales (J.A., 62) were as follows:

1976—$341,270.00	1979—$ 983,000.00
1977—$724,000.00	1980—$1,215,000.00
1978—$796,000.00	

In 1980, Lacey's sales quota was $1,100,000.00, which was based on his 1979 sales performance plus 9% (J.A., 115-116). His actual sales for 1980 were $1,215,000.00 (J.A., 115-116), or 110% of his quota (J.A., 616-617). Company officials admitted that Lacey was the top salesman in Carson's soft carpet division of the Western Pennsylvania region in 1980 (J.A., 652).

In January, 1980, Mr. Lacey's standing in the entire company for sales against quota was number eight of

twenty-two salesmen in his category; in the Pittsburgh region (covering Western Pennsylvania, Ohio and West Virginia (J.A., 74)), he was number one of five soft carpet salesmen (J.A., 71-72, 75). In February, 1980, he was number nine in the company in his category, and number one in Pittsburgh (J.A., 73). In March, he was tenth in the company and first in Pittsburgh (J.A., 73). In April, he was number eight in the company and first in Pittsburgh (J.A., 73). In May, he was sixth in the company and first in Pittsburgh (J.A., 73). In October, Lacey was ranked fifth in the company and first in Pittsburgh (J.A., 75). In November, 1980, he was again number five in the company and number one in Pittsburgh (J.A., 75). See also Plaintiff's Exhibit 18 (J.A., 756-761). These results by Lacey were achieved despite some of his accounts being transferred to another salesman in 1980 (J.A., 512-518).

In 1980, between Christmas and New Year's Day, Lacey was asked to attend Carson's awards dinner for sales in that year. He was commended for his performance, and presented with a plaque, Plaintiff's Exhibit 26, which was inscribed as follows:

> "Carson Pirie Scott & Co. Million Dollar Club, 1980. William M. Lacey is hereby recognized as a member of the Million Dollar Club by achieving One Million Dollars in sales during the designated 12-month period. His membership indicates outstanding sales ability, knowledge of the floor covering industry, and awareness of the needs of the customer. In compiling his record, he has made a notable contribution to the growth of our firm. He has attained the goal of every salesman associated with the Floor Covering Division, and of him we are justly proud." (J.A., 64)

The plaque was signed by Dean McKinney, Executive Vice President of the Division (J.A., 64, 617-618). Carson had

also presented Lacey with an award in 1977 (Plaintiff's Exhibit 40), entitled "Meritorious Sales Award First Place, presented to William M. Lacey, 1977, for distinguished achievement in carpet sales" (J.A., 132).

Lacey also was given a ring by Carson to demonstrate the achievement of a million dollars in sales (Plaintiff's Exhibit 27). The ring was inscribed: "Million Dollars Sales Club"; it was delivered to Lacey in January, 1981 (J.A., 65-66).

Approximately four and one-half months later, Lacey was fired. Between January and mid-May, 1981, he was only able to work for two and one-half months due to an injury sustained while working (J.A., 63). Specifically, Lacey was injured on February 10, 1981, returned to work on April 6, 1981 and was fired on May 16, 1981 (J.A., 85). Plaintiff's Exhibit No. 34, a report from Dr. Duffy, M.D., dated April 3, 1981, indicates that Lacey's injuries were a sprained spine, sprained lumbar spine area and muscle spasms. Lacey was permitted to return to work on April 6, 1981, with some restrictions on heavy lifting, bending and stooping, i.e., "light duty" (J.A., 88-90, 622-624). During his convalescence, Lacey filed a disability claim under workman's compensation, which was honored (J.A., 85, 163).

While on disability, Lacey wondered if he would ever be healthy enough to return to work, so he began to look around for income producing areas. He called the Social Security Office and was told to appear with certain information to discuss his options. He went with the intention of learning what his income would be *if* he retired or was unable to return to work (J.A., 87-88). After being told it would take approximately three months to process

his claim, he gave a date of July 1st for the beginning of Social Security benefits (J.A., 89-90). Lacey continuously emphasized at trial that he only made an inquiry regarding Social Security benefits; he did not intend to apply for them (J.A., 163-164). Also, a Social Security office representative testified that an individual always has the right to withdraw an application, and if he returns to work after being off for a period of time, he may be eligible to receive benefits for the time he was unemployed (J.A., 410).

The sales quota for 1981, given to Lacey on May 14, was $1,315,000.00, approximately 9% or $115,000.00 more than he had produced in 1980 (J.A., 81, 648). He was advised of this quota via a May 11, 1981 letter from Carson. See Plaintiff's Exhibit 17 (J.A., 749, et seq.), entitled "Subject 1981 Meritorious Sales Quotas"; the first paragraph of the letter says:

> "Your sales quotas are based on last year's performance plus a 9% increase reflecting the division's sales budget."

It was customary for Carson to add 9% over the prior year's sales in order to set a quota for the next year (J.A., 76-77).

In the month he was fired, Lacey, for the only time in 1980 or 1981, was not first in his district. A Mr. Hartley was ahead of him by a percentage point or two, and a Mr. Pschirer was the next salesman after Lacey. Neither Hartley nor Pschirer were fired (J.A., 86-87). No one in the Pittsburgh region had reached quota in the first five months of 1981, but the only one fired was Lacey (J.A., 696-697). Carson's manager told Lacey he was being terminated due to "lack of sales and sales performance" (J.A., 545-546). The termination form used by Carson, as it pertains to Mr. Lacey (see Plaintiff's Exhibit No.

32, J.A., 94 and 763) lists the reason for termination as "substandard production", but also indicates that Lacey's rating is "satisfactory" (J.A., 95, 763). Lacey said that prior to May 16, 1981, no one in a supervisory capacity in the company had told him that his production was substandard (J.A., 95).

Concerning Lacey's performance as a salesman, Patsy Macioce testified that he had been employed at Hahn Furniture Company, where he was the department manager (J.A., 236-237). Carson was the supplier to Hahn's, and Lacey was their representative (J.A., 237-238). "He served me well" Macioce said of Lacey, who customarily called on Hahn's every 2 to 3 weeks the entire time he dealt with the store (J.A., 239-240).

William R. Pratt, Vice President in charge of the carpet department for Graffam Floors in Pittsburgh, testified that even in 1986 (when trial occurred) a salesman who sells a million dollars of product accomplishes a "good milestone", and such a person would be a "desired employee" (J.A., 283).

As a result of his dismissal, Lacey was deprived of substantial income and benefits. His projected lost salary from termination in 1981 to retirement at age 70 in 1988 was $329,200.00 (J.A., 116-117). As of May 16, 1981, he lost full medical and hospitalization coverage (J.A., 91, 117), pension benefits and a $5,000.00 life insurance policy (J.A., 91, 132-134, 363).

Prior to being fired, Lacey was not warned or advised in any fashion that his performance was not satisfactory (J.A., 137). On the contrary, he was frequently lauded for his work. In addition to the awards in December and January, Lacey received a memorandum dated January 26, 1981 from Jack Broderick, a Carson sales manager, re-

ferring to a meeting between them on January 22, 1981 (Plaintiff's Exhibit 8), which stated:

> "My initial reaction to our meeting was extremely good. We accomplished some good, concrete direction for both of us in Allegheny County. In order that we might both see the progression being made in the areas discussed, I feel we should have an individual meeting of this type every two months. By calling on the six accounts that we scheduled for February together, I believe we can increase their volume substantially. It is good to hear that you have already signed 10 ASP programs of which five are purchasing the Color Palace rack. Again, I am sure, with your goal of 40 to 50 ASP, 81 dealers and 20 to 25 Color Palace racks being sold in your territory, the sales year will get off to the type of start we both know is necessary to obtain the sales quota established for Allegheny County." (J.A., 138-139)

Lacey and all who testified for Carson agreed that this memorandum was upbeat and motivational, and not derogatory or in the nature of a reprimand (J.A., 139, 372, 401, 620-621).

On March 9, 1981, Mr. W. H. Lawson, Vice President at Carson, authorized Lacey to purchase a new automobile during that year (J.A., 78; Plaintiff's Exhibit 12; and J.A., 132, 166-167). Later, Lawson agreed to give Lacey an extension of two months to make the last payment on Lacey's 1978 vehicle which had low mileage and was of a size appropriate to his job (J.A., 78-79, 168-169). In April 1981, Lacey's manager informed him that he had to purchase a car under his agreement with Carson (J.A., 543). During this period, Lacey was not told of any dissatisfaction on Carson's part.

Plaintiff's Exhibit 29 entitled "Personnel Policies and Procedures-Termination of Employment" (J.A., 96, 762) indicates that employment at Carson will terminate for all associates at age 70. This document goes on to say:

"Except for willful misconduct, proven dishonesty, or failure to meet the Conditions Employment, no Associate will be released from the Company without having gone through the following steps:

1. Verbal discussion of the problem by the immediate supervisor and the Associate. The supervisor will document, sign and date the discussion. (Depending upon the severity, step 1 may be eliminated).

2. If the problem persists, a Corrective Interview (Form CPS 1929) will be conducted. The Corrective Interview will be given by the immediate supervisor in the presence of the next line manager and will become a matter of written record to be signed by the supervisor and manager.

3. If there is no improvement within the time frame designated on the Corrective Interview form, a Warning Interview (Form CD 19/45-776) will be given by the immediate supervisor and the Personnel Representative, to be signed by the Associate.

4. If there is no improvement within the time frame designated on the Warning Interview form, termination will follow.

The disciplinary policy shown above is intended to set the guidelines for the fair treatment of Associates."

Concerning number 1, Lacey said he never had any discussion or meeting with a supervisor during which he was reprimanded and it was reduced to writing (J.A., 97). As to number 2, no such interview took place. Regarding number 3, Lacey never had such a "warning interview", nor was such a form or writing presented to him or signed by him (J.A., 98). Overall, no interviews were conducted with Lacey prior to his termination, and he was never warned of alleged poor sales production (J.A., 98). Car-

son acknowledges that there are no written evaluations or reports of Lacey's performance with the company (J.A., 130). The only possible exception is the above referred-to memorandum of January 26, 1981, which conveys that Carson is pleased with Lacey's efforts. No written reprimands or expressions of dissatisfaction were ever issued to Lacey (J.A., 365, 608). Lacey was not advised that he would be fired if he did not perform his job in a particular way (J.A., 660-661).

Lacey looked for work after being dismissed in May, 1981. He made telephone calls to several mills which manufactured carpet. He was able to obtain at least one interview, but he did not get the job—it was implied that his age was a factor in his not being hired (J.A., 108). Lacey said he also approached the local distributors, but he was not hired because there was no available position (J.A., 108).

Lacey subscribed to two trade journals for the purpose of looking for work; one was called "Modern Floor Covering", and the other was entitled "Floor Covering Weekly" (J.A., 108-109). He consistently reviewed the classified sections in those papers from the time he was discharged "until beyond the point where it was worth even paying any attention to it anymore" (J.A., 109).

Lacey called every local important account (J.A., 109). He said:

> "I didn't just contact them one time. I consistently called them, from time to time, throughout the period, beyond the time I even started receiving social security checks. It got to the point I was just plain discouraged. I didn't feel there was a possibility of anything happening. These people that I knew didn't indicate to me I was too old. They thought I was fine and was a good salesman and I should be valuable to

somebody, but they didn't know anybody that was hiring anybody." (J.A., 109)

In the early 1980's, the Pittsburgh area was in an economic down trend, and businesses in general were not doing too well (J.A., 110).

Lacey also tried—on three different occasions—to have Carson reinstate him to his job (J.A., 110).

Robert O. Bierly, who has been in the carpet business since the 1970's, testified at trial that he became familiar with Lacey when he called on Bierly's Verona, PA store as a representative of Carson (J.A., 228). Bierly said that Lacey, after being fired from Carson Pirie, contacted Bierly several times for the purpose of finding work (J.A., 230). The first time was immediately upon being discharged (J.A., 230). Afterwards, he called at regular intervals (J.A., 230). Bierly even made efforts on behalf of Lacey. He inquired of representatives of other distributors as to whether there were any openings, but he was unsuccessful. Bierly said: "There wasn't anything available in the industry, especially for an older man" (J.A., 231); he simply was not able to find any work for a soft carpet salesman with Bill's particular ability (J.A., 232). Bierly said that Lacey told him in the fall of 1981 that he was making efforts to find a job, and that he had made many contacts in the industry; he was following up on one or two particular leads, but he hadn't been able to find anything (J.A., 233-234).

William R. Pratt testified that he is Vice President in charge of the carpet department at Graffam Floors in Pittsburgh, a carpet distributor (J.A., 279). He has been in the carpet business since 1946 (J.A., 279). His business serves Western Pennsylvania, the Cleveland and Youngstown, Ohio areas, and West Virginia (J.A., 279-

280). Sometime in 1981, approximately September, Pratt and Lacey had a conversation, and Lacey asked whether they could meet and discuss whether Graffam might have employment for Lacey. Pratt did not ask Lacey for a resume (J.A., 286). Lacey later telephoned Pratt (J.A., 286); but Graffam Floors did not have a position at that time (J.A., 280).

Since 1981, Pratt testified his company has not hired any new soft carpet salesmen in the Pittsburgh area (J.A., 280). Pratt explained that a distributor salesman (like Lacey) is a particular breed of salesman, and the availability of jobs in the Greater Pittsburgh area had been greatly lessened by the loss of three rather large distributors and most of the others having a rather stable work force (J.A., 281).

Lacey finally abandoned his search for employment in 1983, since "there was no point in pursuing it further. I was getting nowhere. I constantly maintained contact with these people, not on a daily basis, but erratically, I would call them—I didn't want to pester them to death—and ask them if they knew anything" (J.A., 174).

Lacey repeatedly said during the trial that he had no intention, at any time, of retiring from Carson before age 70 (J.A., 225). He wanted to work (J.A., 186), and he was able (J.A., 92). After he left the employment of Carson, he attempted to contact all the sources of whom he personally had knowledge in an effort to find work (J.A., 225-226), but he was told "there's nothing available" (J.A., 176-177).

Timothy Burdon was hired by Carson approximately five months before Lacey was injured, and after Lacey was fired, Burdon took his place selling soft carpet in Allegheny County (J.A., 66, 302). Burdon was 43 years of

age (J.A., 67, 308), and he was a salaried employee, while Lacey was on commission (J.A., 68, 310).

In his first full year, 1982, Burdon only sold $1.1 million, compared to Lacey's more than $1.2 million in 1980 (J.A., 306). In 1984, Burdon sold $1.6 million, but when this figure is reduced by the 15% increase in carpet prices, Burdon admitted there is not much difference between his $1.383 million net and Lacey's $1.2 million four years earlier (J.A., 320). Burdon did not equal Lacey's sales until he worked three and one-half years for Carson. When asked on cross-examination, "You worked there '81, '82, '83, '84, until you caught up with him", Burdon responded: "I agree" (J.A., 320).

Frank R. Rodzwicz, Carson's district manager through September 1981, who was instrumental in firing Lacey (J.A., 539-540), said that Burdon "was performing admirably in the new position" (J.A., 571). John T. Broderick, Carson's sales manager in Pittsburgh after December 1979, opined that Burdon did an "excellent job" (J.A., 394). Broderick acknowledged that Burdon's sales in 1982 were less than a million dollars, while Lacey's sales in 1980 exceeded 1.2 million dollars (J.A., 397).

None of the Pittsburgh district soft carpet salesmen reached or exceeded their respective 1981 sales quotas. In 1981, none of them met Lacey's sales for 1980 (J.A., 92-93).

Ronald Sherwood, a soft carpeting distributor in the Scottsdale, Arizona area, testified that he was hired by Carson in the Spring of 1974 as the carpet sales manager of the Pittsburgh district (J.A., 247-248). He hired Lacey who was 55 or 56. His other employees were Warren McWilliams (about 50), Harry Nagle (in his fifties), Jimmy Wilkes (45) and Frank Hartley (mid to late thir-

ties). Sherwood was 45 years old (J.A., 248-249). Sherwood said that when he started with Carson, he inherited a situation where the company had lost money in Pittsburgh for 22 consecutive years (J.A., 249-250). Within a year or two, the division became profitable (J.A., 250). Nevertheless, Sherwood said that "he was taken to task" by Pat Shaw, Carson's national sales manager; he was admonished because he had collected a group of people Shaw referred to "as over-the-hill, retreaded, has-beens," (J.A., 250-251, 261-262). Shaw "didn't possibly see how this group of people was going to do a job here for Carson Pirie Scott" (J.A., 251).

Sherwood said Lacey "was a doggone good salesman, knowledgeable, dependable; in fact, I looked to Bill for input" (J.A., 251). Sherwood left Carson in April or May of 1979, after Dean McKinney, Carson's Executive Vice President, told him it was time for him to leave the company (J.A., 252-258). Sherwood was replaced by Rodzwicz, who was in his middle twenties (J.A., 259).

Between 1979 and 1981, none of the Pittsburgh area salesmen went on pension (J.A., 130).

———o———

SUMMARY OF ARGUMENT

The decision below does not conflict with the burden of proof requirement set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). As petitioner conceded at trial, a plaintiff may, but need not, present rebuttal evidence. Here, the evidence as a whole supports the jury verdict that Lacey was a victim of age discrimination on the part of Carson.

Carson did not ask the trial court to equitably determine whether Lacey was entitled to future lost earnings.

Nor did Carson object to the instructions allowing the jury to make such an award. Consequently, Carson's present argument has been waived. Nevertheless, the evidence clearly supports the jury's award of "front pay."

Carson also waived its present argument regarding mitigation due to its failure to object to the applicable jury instructions. Nevertheless, the evidence clearly supports the jury's finding that Lacey did not fail to mitigate his damages.

INTRODUCTION

In this case, there are no "special and important reasons" for the granting of the Petition for Writ of Certiorari. In fact, the issues raised in the petition have all been properly ruled upon in the lower courts or they have been waived by the petitioner.

ARGUMENT

I. & II.

THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS ON BURDEN OF PROOF, AND THE EVIDENCE AS A WHOLE SUPPORTS THE JURY VERDICT.

A.

The Decision Below Is Not In Conflict With An Applicable Decision Of This Court.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), this Court thoroughly describes the "basic allocations of burdens and order of presentation of proof in a . . . case alleging discriminatory treatment" in the related and parallel setting of Title VII (42 U.S.C. § 2000e et seq.):

> "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff suc-

ceeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

. . .

It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext

. . .

The plaintiff retains the burden of persuasion. He now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. He may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S. at 804-805, 36 L.Ed.2d 668, 93 S.Ct. 1817." 450 U.S. at 252-256 (footonotes omitted).

In the instant case, the Third Circuit wrote the following in its Memorandum Opinion concerning the procedures for an action under the ADEA:

> "A plaintiff may recover only if he proves by a preponderance of the evidence that age was a determining factor in his termination and he may do this by direct or circumstantial evidence. If a plaintiff in his case meets this burden, the defendant, to avoid a motion for a directed verdict, must articulate and support by evidence a legitimate, nondiscriminatory reason for its action. If the defendant does this, the plaintiff then has the burden to prove discriminatory animus in the defendant's actions, thus overcoming the defendant's claim of justification. The plaintiff, however, may meet his burden either in his case in chief or by rebuttal evidence." (A-5, A-6)

This statement of the law is not incorrect, and it does not conflict with *Burdine* or any other case decided by this Court.

While referring to the frequently mentioned footnote 10 of *Burdine*, Carson only recites a single sentence of it (Petition, 26-27). Quoted in its entirety, it says:

> "10. See generally J. Thayer, Preliminary Treatise on Evidence 346 (1898). In saying that the presumption drops from the case, we do not imply that *the* trier of fact no longer may consider *evidence previously introduced by the plaintiff to establish a prima facie case.* A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence *and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*" 450 U.S. at 255, n.10 (emphasis added)

Burdine thus confirms, in no uncertain terms, that the plaintiff may, *but need not*, present rebuttal evidence. He must have the opportunity to do so. However, his election not to present rebuttal evidence cannot form the basis for a judgment n.o.v. against the plaintiff. He may instead, without the risk of adverse judicial ruling, elect to stand on a) his case in chief, b) his cross-examination of defense witnesses, c) his closing argument and/or d) the court's instructions to the jury.[1]

---

[1] See also: *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir. 1987):

> "Because Spencer [defendant-employer] proffered evidence of a legitimate non-discriminatory reason, the issue before us is whether the record as a whole contains sufficient evidence from which the factfinder could infer that the defendant was guilty of intentional discrimination. Because Chipollini [plaintiff-employee] offered no direct evidence of a discriminatory motive, questions regarding intent and its manifestations are, at this point, subsumed under the inquiry into employer pretext."

Grecco v. Spang & Co. (I), 527 F.Supp. 978, 982 (W.D. Pa. 1981):

> "The defendant . . . argues that even if the plaintiff . . . demonstrated his ability to make out a prima facie case, the evidence of a bona fide business justification for the plaintiff's discharge required the plaintiff to *respond with additional evidence* that the defendant's business justification was a pretext and since plaintiff failed to do this defendant is entitled to summary judgment. However, as the Court held in *Burdine, supra*, a satisfactory explanation by defendant does not require the plaintiff to come forward with additional evidence attacking the explanation, it merely 'destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence . . .' and joins the issues for resolution on all of the evidence by the trier of the fact." (emphasis in original)

Grecco v. Spang & Co. (II), 530 F.Supp. 782, 794 (W.D Pa. 1982):

> "We believe that the fallacy of the defendant's position lies in its contention that once it has produced evidence, whether it be evidence to rebut the elements of the prima facie case or to proffer a business justification defense, the law requires that the plaintiff move forward and present additional evidence to counter the defendant's case. If the defendant tenders evidence that challenges the existence of one of the elements of a prima facie case,

Furthermore, Carson's concession at trial and failure to object at trial to the lawful procedure of not requiring the plaintiff to present "rebuttal" constitutes a waiver of Carson's present argument to the contrary (Petition, 6-7, 30 et seq.)[2]

In this case, Lacey merely elected to take one of two legally permissible courses. He presented no rebuttal evidence, and chose instead to rely on his case-in-chief, his cross-examination of the defendant's witnesses, his closing argument and the jury instructions. By conceding, at trial, that this is a legally permissible course, Carson waives its claim that Lacey must present rebuttal evidence. Moreover, in light of principle, authority and simple legal tradition in permitting but not requiring rebuttal, the plaintiff in an age discrimination case may, but need not present rebuttal evidence.

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the defendant only has created a genuine issue of material fact which must be resolved by the fact finder. Cf. *Rhodes v. Robinson,* 612 F.2d 766 (3d Cir. 1979); *Perks v. Firestone Tire and Rubber Co.,* 611 F.2d 1363 (3d Cir. 1979); *See generally,* 6 Moore's Federal Practice § 56.15 [1.-0] (2nd ed. 1981). And in the event that the defendant presents evidence of a legitimate business justification, the plaintiff must be given an opportunity to cross-examine the defendant on this point before the fact finder. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 255 fn. 10, 101 S.Ct. 1089, 1095 fn. 10, 67 L.Ed.2d 207, 216 fn. 10 (1981). In either case, the legitimacy of the defendant's discharge of the plaintiff may not be decided on a motion for summary judgment where the plaintiff has made out his prime facie case, and the issues must be submitted to the trier of fact."

[2] The trial transcript reflects that Carson's trial counsel stated:

"I agree with everything you said. The plaintiff—*there are two ways to try one of these cases.* You could do bare bones prima facie, defendant's non-discriminatory reason, here is my additional evidence. Or you can put all your evidence in during the plaintiff's case in chief.

THE COURT: Right.

MR. POTTER: Right. And then listen to the defendant's non-discriminatory reason.

THE COURT: Umhum." (J.A. 431-432, emphasis added)

As the Third Circuit reasoned:

> "Plaintiff was not required to present rebuttal evidence if his case in chief included evidence sufficient to justify the jury in not accepting defendant's contentions. There is simply no requirement that a plaintiff bifurcate a case under the ADEA, although he may desire to do so. Further, in an ADEA case, as in any lawsuit, a jury is entitled to draw reasonable inferences from the evidence notwithstanding the fact that an opposing party has presented direct contrary evidence." (A-6, 7)

B.

The Evidence On The Entire Record Supports The Jury Verdict In Lacey's Favor.

Carson's entire argument is premised on the need, in an age discrimination case, for "some independent evidence to refute the employer's business rationale" (Petition for Writ of Certiorari, hereafter referred to as "Petition", 20); an employee's requirement "to create an issue of fact out of the employer's reasons" (Petition, 20) and to "produce affirmative evidence of age discrimination" (Petition, 22); and proof of "pretext through a preponderance of the evidence by specifically showing or at least contesting that the underlying facts of the employer's explanation are a cover for discrimination" (Petition, 23, 37). In the instant case, Lacey did present such independent evidence; he did create a factual issue from Carson's stated reasons; he did produce affirmative evidence of age discrimination; and he did prove pretext through a preponderance of the evidence. And the jury so found.

Then, the District Court held:

> ". . . we conclude that viewing the evidence in a light most favorable to the plaintiff there is no basis on which to grant defendant's motion for judgment n.o.v." (Appendix to Petition, hereafter referred to as "A", 20)

Subsequently, the Third Circuit affirmed this holding (A, 9).

A review of the evidence, as a whole and in the light most favorable to Lacey[3], clearly supports the jury verdict.

Under 29 U.S.C. § 623(a), "it shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual . . . because of [his] age." Here, there is ample evidence to support the jury's finding that Carson intentionally discriminated against Lacey on the basis of his age.

In each year, from 1976 through 1980, Lacey exceeded the annual sales quotas set by the company (J.A., 60-62, 110, 345); this was accomplished in spite of what Carson recognized as tough economic times in the Pittsburgh area (J.A., 492). In 1980, he led the Western Pennsylvania sales staff (J.A., 652); for the entire company, he ranked eighth in his category of twenty-two salesmen (J.A., 71-72, 75). In December, 1980, at Carson's awards dinner, Lacey was presented with a plaque for achieving a million dollars in sales, his "outstanding sales ability" and his "notable contribution" to Carson's growth (J.A., 64); in January, 1981, Carson presented Lacey with a ring for his sales achievements (J.A., 65-66).

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[3] The standard for reviewing the denial of a motion for judgment notwithstanding the verdict is as follows:

> "We are required to 'review the record . . . in the light most favorable to the non-moving party, . . . and to affirm the judgment of the district court denying the motions unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" *Black v. Stephens*, 662 F.2d 181, 187 (3d Cir. 1981)
>
> "[C]onflicting evidence which could reasonably lead to inconsistent conclusions will not justify a judgment notwithstanding the verdict or a directed verdict . . . It is the function of the trier of fact alone, the jury in this instance,

(Continued on following page)

On February 10, 1981, Lacey sustained a back injury on the job, and he was unable to work again until April 6, 1981. During that period, he was disabled and on workman's compensation; when he returned, he was restricted to "light duty" (J.A., 63, 85, 88-90, 163, 622-624). On May 16, 1981, Lacey was fired at the age of 63, supposedly for poor sales performance. His replacement, Mr. Burdon, was 20 years younger and a salaried employee; Burdon was eventually replaced by one Mr. Porter, who was 28 years of age and also on salary.

The evidence, when viewed in its entirety and in the light most favorable to the verdict winner, clearly demonstrates that Carson's articulated reason for firing Lacey was pretextual.

Due to his disability leave, Lacey did not have sufficient time to work in 1981, before being fired. Nonetheless, despite only working approximately 2½ months (or 81 days) in 1981, he had made sales totaling $394,113.08, which represents 30% of his annual quota and 70% of his year-to-date quota at the time of his termination. It is noted, at that time, the district's top producer was at 72% of year-to-date quota, and the third highest producer was at 50% of year-to-date quota; both of these individuals had worked full time in 1981. However, only Lacey was fired. (J.A., 86-87, 696-697).

(Continued from previous page)

to evaluate contradictory evidence and to draw inferences therefrom." *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976).

"The . . . motion [for judgment n.o v.] requires a judge to determine whether the evidence and justifiable inferences most favorable to the prevailing party afford *any rational basis* for the verdict." *Zegan v. Central Railroad Co. of New Jersey*, 266 F.2d 101 (3d Cir. 1959); emphasis added.

There is clearly a "rational basis" for the verdict in Lacey's favor. His evidence and the reasonable inferences therefrom support the jury's finding.

There is not one shred of tangible evidence, e.g., memos, performance data or other company records, to reflect any dissatisfaction with Lacey's performance. There are no written reprimands or criticisms, and he had never been threatened with firing (J.A., 137-139, 372, 401, 620-621). Moreover, Lacey was not terminated in compliance with company policy. Specifically, the company had no written disciplinary memorandum; he was not afforded the required corrective interviews or warning interview (J.A., 97-98, 130, 365, 608, 660-661). On the contrary, the records which do exist are complimentary.

Lacey showed that Carson realized certain economic gains in firing him and other older employees. In hiring new and much younger salesmen on a salary basis, while replacing older salesmen who were compensated on a commission basis, it is inferred that the company made more money per sale. Here, as in *Dace v. A.C.F. Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983), Lacey presented specific evidence by which the jury could find that the company fired him to save money, and linked that evidence to the alleged discrimination. On this basis, the jury reasonably concluded that there indeed had been a violation of ADEA.

In addition to Carson saving money by terminating Lacey and replacing him with salaried employees who earned less, the company also did not have to pay Lacey's unvested pension benefits. In fact, between 1974 and 1981, none of the Pittsburgh area salesmen went on pension (J.A., 130). This proved that there was a distinct difference in terms of company expenses between the "cost" for Lacey's services and that of the newly hired, younger employees—a difference inuring to the company's considerable benefit.

The company's attitude and views toward the older salesmen is reflected in comments by a former national sales manager to the Pittsburgh district's carpet sales manager (who left in the Spring of 1979). The Pittsburgh manager was "taken to task" for having a sales force of "over-the-hill, retreaded, has-beens" (J.A., 250-251, 261-262).

Further evidence that the company's stated reason for Lacey's firing was a mere pretext centers around Carson's averment that Lacey did not sell enough display rack and automatic sampling programs. Considering his overall sales performances, such an averment is shallow, even if true. But, it is not--witness Lacey's placement of these programs (J.A., 77-78, 217-218), and the company's written expression to him in late January 1981 that it was pleased with his progress (J.A. 138-139). Another asserted reason as grounds for firing Lacey—lack of expansion of commercial accounts—was contradicted by Hahn Furniture Store's carpet manager who testified that Lacey called on him frequently and served him well (J.A., 236-240).

Lacey's sales performance itself, as well as how it compared to that of his successors, is the most significant proof that the company's stated reason was pretextual. Having consistently exceeded his quota[4] from 1976 to 1980, and being commended for it, rebuts any Carson "belief" that he had not developed his territory. See *Berndt v. Kaiser-Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 258-259 (3d Cir. 1986). Furthermore, Lacey's successor, Mr. Burden, sold *less* in 1982 (after over one and one-half

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[4] All quotas were established by Carson's headquarters; salesmen were advised in writing (J.A., 71). Even trial counsel for Carson referred to the "quota assigned to you" (see e.g., J.A. 222).

years on the job) than Lacey did in 1980; and Burdon did not equal Lacey's 1980 sales until he worked three and one-half years for Carson (J.A., 306, 320). Despite this, Carson felt Burdon was "performing admirably" (J.A., 394-397, 571).[5]

In sum, there is more than adequate evidence in the record to enable the jury to have found that age was a "determinative factor" in Carson's decision to terminate Lacey. Obviously, the jury did not believe he was fired due to concern over his performance; rather, the proof showed that it was in the company's interest to eliminate older employees. Lacey demonstrated that " . . . a discriminatory reason more likely motivated the employer . . ." *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 256.

III.

BECAUSE CARSON DID NOT REQUEST THE TRIAL JUDGE TO MAKE AN EQUITABLE DETERMINATION CONCERNING "FRONT PAY", AND BECAUSE CARSON DID NOT OBJECT TO THE JURY INSTRUCTIONS ON THIS POINT, THE ISSUE HAS BEEN WAIVED. REGARDLESS, THE JURY'S AWARD OF FUTURE LOST EARNINGS IS CLEARLY SUPPORTED BY THE EVIDENCE.

Consistent with *Maxfield v. Sinclair International,* 766 F.2d 788 (3d Cir. 1985), the district court instructed the jurors that if they found Carson to be liable, i.e., if Lacey's age was shown to have been a determinative factor in his termination, then on the issue of damages Lacey would be entitled to

> "wages and certain benefits [he] would have received from the date the Defendant discharged him to the

[5] This evidence was highlighted by the district court in explaining why the case was to be decided by the jury (J.A., 435-436).

> date of this trial, and future wages to age 70." (J.A., 473)

Carson did not object to these instructions.

The clear language of *Maxfield* unequivocally confirms that the "amount of damages available as front pay is a jury question." *Id.* at 796. Despite this, Carson now argues that the award of "front pay" to Lacey is an equitable determination for a judge. Carson did not request the trial judge to make such a determination; nor did Carson object to the jury instructions on this point (quoted above). Therefore, *it has waived this issue* and cannot now complain about the result.

Carson also argues that, in general, a front pay award is speculative. However,

> "an award for future lost earnings is no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases." *Id.*

Also,

> "the plaintiff's duty to mitigate damages should serve as an effective control on justified damage awards." *Id.*

Specifically, in the instant case, the award of front pay is not speculative at all, but clearly supported by the evidence, which shows a *pattern of past increases* enjoyed by Lacey, and a *strong likelihood of similar increases continuing* had Lacey remained in Carson's employ.

The evidence at trial disclosed that Lacey exceeded his quota each year from 1976 through 1980 (J.A., 60-62, 110). From 1976 through 1981, there was at least a 9% increase in his sales quota in each successive year (J.A., 86, 114-115), and as mentioned Lacey exceeded each one of them. His projection of lost earnings was from 1981, at the point of termination, through 1988, when Mr. Lacey

will reach the age of 70, which is the company's mandatory retirement age. Lacey based his request for "front pay" only upon his former earnings history. There were no projections which required expert testimony. It was undisputed that Lacey had exceeded his sales quota for each year of his employment. In 1980, his quota was 9% over that of 1979; in 1981, his quota was 9% over that of 1980 (see Plaintiff's Exhibits 17 and 18, J.A., 749-761). His future lost earnings were projected "only upon [this] former earnings history".

Front pay is appropriate when a firing precludes reentry into the workforce, or when there has been deliberate discrimination. Here, both conditions existed. First, due to Lacey's age and the lack of available positions in the industry, not to mention the stigma attached to a "firing", reentry into the workforce was effectively precluded. Second, the evidence discloses Carson's deliberate discrimination against Lacey because of his age.

It is also noted "front pay" is the only appropriate relief under the circumstances. No evidence was presented to show that a position was available for Lacey. And, the relationship between Lacey and Carson was so damaged that reinstatement would not be feasible.[6]

Carson makes a back-door effort to undermine the jury verdict and the district court order denying the post-trial motion. The jurors were correctly instructed on mitigation and on the circumstances under which front pay is fitting. Carson did not request the trial judge to make an equitable determination; nor did Carson object to the jury instructions. Based on applicable standards,

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[6] That reinstatement was ill-suited to this case is also confirmed by Carson's having three times denied Lacey's request for reinstatement. (J.A. 110)

the award of front pay is proper and clearly supported by the evidence.

IV.

BECAUSE CARSON DID NOT OBJECT TO THE JURY INSTRUCTIONS CONCERNING MITIGATION, THIS ISSUE HAS BEEN WAIVED. REGARDLESS, THE JURY'S DETERMINATION THAT LACEY DID NOT FAIL TO MITIGATE DAMAGES IS CLEARLY SUPPORTED BY THE EVIDENCE.

The district court instructed the jury as follows:

"If you find that the Defendant unlawfully discharged the Plaintiff because of his age, the Plaintiff is entitled to damages consisting of the wages and certain benefits he would have received if the Defendant had not unlawfully and improperly discharged him. This consists of wages and certain employee benefits Plaintiff would have received from the date the Defendant discharged him to the date of this trial and future wages to age 70. From that amount, you should subtract the amount of wages or earnings he received from other jobs during the same period. And, if you find that the Defendant has proved by a fair preponderance of the evidence that Plaintiff unjustifiably failed to take a new job or the like, or a job of like status and pay, which was available to him, or failed to make reasonable efforts to find a new job, you should subtract from Plaintiff's damages any amount he could have earned in a new job after his discharge.

. . .

The purpose of the Age Discrimination in Employment Act is to make persons whole for injuries suffered as a result of unlawful employment discrimination under the Age Discrimination in Employment Act. A successful Plaintiff is entitled to recover lost wages and benefits, including increases in wages. The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the adverse action, the date of the

> firing, to the date up to age 70, if you find that the Plaintiff otherwise would have been employed. You must subtract any wages the Plaintiff received from any other employment or would have received had he made reasonable efforts to obtain such employment.
>
> . . .
>
> In considering the damages you award the Plaintiff, you must remember, as I have indicated, that Plaintiff has a duty to mitigate his damages; that is, to take advantage of any reasonable opportunity he may have, under the circumstances, to reduce or minimize his loss or damage.
>
> The Defendant bears the burden to prove that the Plaintiff failed to mitigate damages. The Defendant must show by a fair preponderance of the evidence that there were suitable positions available Plaintiff could have obtained, and that Plaintiff failed to use reasonable care in seeking those opportunities out. A suitable position is one which is consummate with the Plaintiff's particular skills, background, and experience.
>
> If you should find from a preponderance of the evidence that the Plaintiff failed to use reasonable care or due diligence in seeking out any employment opportunity that was reasonably available to him under all the circumstances, then you should reduce the amount of damages by the amount he reasonably could have acquired if he had taken advantage of these employment opportunities." (J.A., 473-476)

Carson did not object to these instructions on a timely basis in accordance with Rule 51 of the Federal Rules of Civil Procedure. Carson argues that the jury should not have been permitted to award any back pay or front pay after 1981 (Petition 52-54).[7] But, at trial, Carson did not object to the district court telling the jury it could calculate damages to 1988. Therefore, *the issue was not prop-*

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[7] In the Third Circuit, Carson argued that Lacey should not have been awarded back pay or front pay after *1983* (Brief for Appellant, p.44).

erly preserved for review; it has been waived and Carson cannot now complain of the result.

Furthermore, the jury rejected the notion that Lacey failed to mitigate damages, and there is no persuasive argument for setting aside its decision. The Third Circuit did not apply an incorrect standard or review this case in a manner which conflicts with that of other Circuits. The Court simply held:

> "We see no merit to defendant's contention that plaintiff failed to mitigate damages and thus is barred from relief for there was evidence that plaintiff attempted to find other employment but was unsuccessful. The jury obviously accepted plaintiff's testimony in this regard and we have no reason to reject these findings." (A-7)

Mitigation is a question for the jury. The burden is on the defendant (Carson) "to demonstrate *both* that plaintiff (Lacey) failed to exercise reasonable diligence to mitigate his damages, *and* that there was a reasonable likelihood that plaintiff might have found comparable work if he had exercised reasonable diligence." *Wehr v. Burroughs Corp.*, 619 F.2d 276, 278, n.3 (3d Cir. 1980) (emphasis added). The duty to mitigate, however, does not *obligate* a plaintiff to accept a position that " 'is not consonant with his particular skills, background and experience' or 'which involves conditions that are substantially more onerous than his previous position.' " *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 73 L.Ed.2d 721, 732, n.16 (quoting *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307 (D.C. Cir. 1972)).

The burden of proving "failure to mitigate" is on Carson. In that regard, Carson must have shown

> ". . . by a fair preponderance of the evidence that there were suitable positions available [Lacey] could have obtained, and that [he] failed to use reasonable

> care in seeking those opportunities out. A suitable position is one which is consummate with the plaintiff's particular skills, background and experience." (J.A., 475)

In examining the record, it is plain that Carson did not make such a showing.

Viewed in the light most favorable to Lacey, the verdict winner,[8] the evidence pertaining to his efforts to obtain employment are summarized[9] as follows:

1) Lacey made telephone calls to several carpet manufacturers; he had one interview, but was not offered the job (J.A., 108);

2) he frequently approached the local distributors; he was told repeatedly that there were no available positions (J.A., 108, 174, 230, 280);

3) Lacey subscribed to two trade journals and consistently reviewed the classified sections (J.A., 109);

4) he called upon every one of the important local accounts which he serviced while at Carson—they could not tell him of anyone who was hiring (J.A., 109);

5) Lacey sought to have Carson reinstate him to his former sales position on three different occasions (J.A., 110);

6) an acquaintance in the carpeting business looked for work for Lacey, but he was unsuccessful (J.A., 231).

Lacey looked for work from all available sources. He inquired of employment possibilities as far as Atlanta, Georgia (even though a wrongfully discharged employee need not accept, in mitigation of damages, employment

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[8] As it has throughout its petition, Carson ignores the basic law which requires this Court and the parties to this appeal to view the evidence in the light most favorable to Lacey, Carson's analysis is flawed by its own insistence that only the evidence which favors its position be considered.

[9] See a more detailed recitation of the facts concerning mitigation in the foregoing Statement of Case, *supra*.

which is located an unreasonable distance from his home; see *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119 (4th Cir. 1983)). Also, he looked for work after he began receiving Social Security benefits (J.A., 184, 233-234).

William Pratt, from the Graffam Flooring Company, testified that a man of Lacey's qualifications was unique in the carpet sales business, and that carpet distributors in Western Pennsylvania had beeen going out of business in the late 1970s and continuing up to the time of trial. Pratt's company had not hired a salesman in Lacey's category from the time of Lacey's dismissal to the time of trial.

It was also proven during the course of trial that Allegheny County in Western Pennsylvania was a depressed economic area during the applicable time period, and employment possibilities in general were lacking (J.A., 110, 281). Additionally, Lacey's age (J.A., 108, 231) and the stigma of having been fired made finding a job extremely difficult. Eventually, after his continued and long term efforts proved fruitless, he looked no further.

Concerning the second requirement to be met by Carson, there is no evidence that "there was a reasonable likelihood that [a person in Lacey's circumstances] might have found comparable work. . . ." *Wehr v. Burroughs Corp., supra.*

CONCLUSION

Based upon the reasons stated above and the record as a whole, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,
DENNIS J. CLARK
NORMAN G. HAYWOOD
Attorneys for Respondent

No. 87-1731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CARSON PIRIE SCOTT & CO.
Petitioner,
v.

WILLIAM M. LACEY,
Respondent.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GERARD C. SMETANA*
MICHAEL E. AVAKIAN
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

Attorney for Appellant

**Counsel of Record*

OF COUNSEL:
ROBERT J. KARTHOLL, JR.
Carson Pirie Scott & Co.
Division General Counsel
One South State Street
Chicago, Illinois 60603
(312) 641-8040

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IN THE
SUPREME COURT OF THE UNITED STATES

CARSON PIRIE SCOTT & CO.,

Petitioner,

v.

WILLIAM M. LACEY,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The importance and substantiality of the questions presented have not been denied by the respondent. Neither has he disputed that the questions of law involving the evidentiary burden of proof in cases arising under the ADEA now pending from the Third Circuit before this Court in Harbison-Walker Refractories v. Brieck, cert. granted, 56 U.S.L.W. 3647 (March 21, 1988) (No. 87-271) and Westinghouse Electric Corp. v. Bhaya, 832 F.2d 258 (3d Cir. 1987), cert. filed, 56 U.S.L.W. 3627 (Feb. 29, 1987)(No. 87-1448), directly bear on whether the cor-

rect legal standard was applied in this case. Noticeably absent from respondent's presentation is any reference to the questionable evidentiary standard formulated in the Bhaya case, which the Third Circuit expressly ruled was controlling the legal outcome of the instant case.

Respondent further contends that petitioner waived its arguments concerning front pay and the duty to mitigate damages for failure to object at trial. Opp. at 13. These same arguments were raised by respondent in the court of appeals below, fully briefed and rejected, as the Third Circuit confronted each of these questions. None of the concrete issues would have been reached if the Third Circuit believed the respondent's argument that a waiver had occurred.[1]

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[1]To the extent respondent suggests that the issues here have been waived, he should have cross-petitioned for a writ of certiorari on these issues. Because he has not, the waiver issues are not now before the Court. As to the merits of respondent's waiver argument, Carson presented its

(continued...)

I. RESPONDENT'S FAILURE TO CONFRONT THE THIRD CIRCUIT'S DEPARTURE FROM THE DECISIONS OF THIS COURT, AS EVIDENCED BY THE GRANT OF CERTIORARI IN HARBISON-WALKER REFRACTORIES, HIGHLIGHTS THE CONFLICT THAT MUST BE DECIDED IN THIS CASE

In its Petition, Carson fully set forth the important evidentiary issue that will be resolved by the Court in Harbison-Walker Refractories v. Brieck, 624 F.Supp. 363 (W.D.Pa. 1985), rev'd mem. 822 F.2d 52 (3d Cir. 1987), cert. granted, 56 U.S.L.W. 3647 (March 21, 1988)(No. 87-271), namely, whether a plaintiff who alleges intentional discrimination can survive summary judgment

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[1](...continued)
proposed jury instructions to the trial judge involving front pay, mitigation and evidentiary burden, but they were rejected. Defendants Instructions Nos. 5-10, see Appellants Reply Brief at 20-25, were rejected by the trial court. (J.A. 436-37, 447-48). In the Third Circuit, by "obtaining a ruling on a proposed instruction a litigant has satisfied Rule 51." Bowley v. Stotler & Co., 751 F.2d 641, 646 (3d Cir. 1985). The colloquy between the trial judge and counsel also acts to preserve the party's position. Transcontinental Leasing v. Michigan Natl. Bank, 738 F.2d 163, 167 (6th Cir. 1984).

merely by questioning his employer's business judgment, without presenting any affirmative evidence that his employer's decision was in fact motivated by an intent to discriminate. The Third Circuit answered that a plaintiff could and in the case of Bhaya v. Westinghouse Electric Corp., 832 F.2d 258 (3d Cir. 1987), cert. filed, 56 U.S.L.W. 3627 (February 29, 1988)(No. 87-1448), determined that an inference of discrimination is, in fact, established by a prima facie case. This permits a jury to disregard an employer's articulated non-discriminatory reason for discharge. Bhaya was specifically relied upon by the court below to deny the appeal. Pet. A-6.

Respondent has clearly refused to discuss the impact and importance the two cases now before the Court have under the ADEA. By only referring to the Title VII burden elucidated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), respondent undermines his position

since the instant case arises under the ADEA and this Court has repeatedly recognized that the two statutes have significant remedial and procedural differences. Lorillard v. Pons, 434 U.S. 573, 584 (1978). Moreover, petitioner presented the Third Circuit with these very differences and the lucid construction of the weaker presumption of bias in age cases, as explained by Judge Adams in Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1401 (3d Cir. 1984); Pet. at 33-35.

The court below chose not to recognize the distinction this Court has repeatedly cautioned should be made between the two statutes. The statutes do not become identical by simply not addressing how the burden of proof in ADEA cases should logically follow Title VII laws or explaining how an "inference of discrimination" is created from an ADEA prima facie case, but "destroyed" in a Title VII case through a satisfactory employer explanation as respondent and

the Third Circuit have chosen to do.

Respondent can only illustrate that he was not required to present rebuttal evidence, but could rely on his case in chief, cross-examination of defense witnesses, closing argument and jury instructions to meet this ultimate burden of proof. Opp. at 16. He cites the Third Circuit case of Chippollini v. Spencer Gifts, 814 F.2d 893, 898 (3d Cir. 1987), dismissed, 108 S.Ct. 26 (1987) (Rule 53), and the early summary judgment case of Grecco v. Spang & Co., 527 F.Supp. 978 (W.D.Pa. 1981), later decision, 530 F.Supp. 782 (W.D.Pa. 1983), which ruled that an issue of fact is created by the prima facie case which must be resolved by the trier of fact. Again, these issues will be resolved in Harbison-Walker Refractories v. Brieck. However, the Third Circuit never contended in its decision in the instant case that here was a special situation where the cross-examination of witnesses was enough to meet the plaintiff's ultimate bur-

den of proof that his age was the determinitive factor in the decision to discharge him.[2]

In the case at bar, defendant presented direct evidence that it was losing money in Pittsburgh. Respondent Lacey was supposed to be Carson's leading productive salesman in the territory whose work would create the volume necessary for Carson to earn a profit. Lacey, however, could never produce enough volume in Pittsburgh to justify Carson's presence in Pittsburgh and Carson's sales managers determined that after attempting to help him in 1979, 1980 and

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[2]Respondent indicates that counsel for petitioner made a concession at trial in a colloquy with the trial judge, after the close of the evidence, that there is no absolute requirement for presentation of rebuttal evidence. Opp. at 17 n.2. But the record shows in the next sentence, counsel for petitioner stated: "But the plaintiff will not get to the jury merely because he has a bare bones prima facie case. The case which he put in prior to the time he rested had better go beyond a bare bones prima facie case and had better contain evidence." (J.A. 432).

1981 (J.A. 503, 505-7),[3] Lacey never would meet the company's required level of sales because Lacey felt that the national sales program was bad policy. (J.A. 527).

The critical fact omitted from respondent's case in chief and not disputed in his cross-examination of defendants' witnesses, is that Lacey's sales were simply not enough to make a profit. A business simply cannot afford to maintain employees who are not

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[3]It is undisputed that in 1979 Carson sent a new district manager to Pittsburgh to improve its Pittsburgh territory sales (J.A. 204-05), that Carson assigned a special contracts salesman to Pittsburgh to service some current accounts to permit Lacey to concentrate on new sources of demand (J.A. 199), and that the National Vice President made special visits with Lacey to his accounts in the Fall of 1980 to evaluate Lacey's sales efforts and presentations. (J.A. 333-35, 523). This led to the unprecedented letter of January 22, 1981, by Broderick, memorializing their meeting to Lacey that he must comply with Carson's sales program. Pl.Ex. 8. Broderick testified the letter was "emphatic. I wanted it to be understood that this was very important that these procedures that we discussed were followed as far as the dealers were mentioned to call on, the amount of placement of samples, etc." (J.A. 392). "I would say it was a situation of advisement." (J.A. 401).

productive. Congress never intended for the Age Act to supplant an employer's ability to ensure its employees earn their keep. It "was not intended to 'diminish traditional management prerogatives,'" Burdine, 450 U.S. at 259 (quoting United Steelworkers of America v. Weber, 443 U.S. 913, 207 (1979). They were to be "left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 2d Sess., Part 2 at 29 (1963).

In the case at bar, all the evidence respondent could introduce only shows he knew how to sell carpet and could sell at least $1 million per year. He never established that during his five year tenure with Carson he sold enough carpet in Pittsburgh for a profit to be made, the articulated business reason for his discharge. Having failed to introduce evidence in rebuttal that Carson's actual monetary losses were not its true reasons, but were a pretext for age discrimination against him,

he failed to meet his ultimate burden of persuasion. Carson should have been granted a directed verdict.

Caselaw developed in the Third Circuit has, however, permitted the jury to infer discrimination solely from the plaintiff's prima facie case setting forth his simply being a member of the protected class. This end run around the three-part burden of proof established by the Court in Burdine departs from Congress' intention not to bar management from making hard business decisions regarding its employees. As set out in the petition, this case truly represents a situation where a business to survive must be allowed to restructure itself on the basis of its profits and losses.

Here, respondent introduced no evidence that petitioner was motivated by an intent to discriminate. "Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent." White

v. Valhally, 732 F.2d 1037, 1043 (1st Cir. 1984), cert. denied, 469 U.S. 933 (1984).[4]

> Decisions [as to the relative capabilities of workers] will always involve a number of subjective factors, and disappointed candidates cannot expect a federal judge [or jury] to intervene simply in the hope that he or she will evaluate the factors differently. The ADEA only requires the intervention of the federal judiciary when age is a determining factor in the decision.

Parker v. Federal Nat'l Mortgage Assn., 741 F.2d 975, 981 (7th Cir. 1984).

II. RESPONDENTS' CHARACTERIZATION OF THE RECORD WITHOUT REFERENCE TO THE EMPLOYER'S ARTICULATED REASONS FOR DISCHARGE HIGHLIGHT THE NEED FOR THE EVIDENTIARY BURDEN IN AGE CASES TO BE CLARIFIED

Respondent places great weight on the

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[4]Respondent contends that since Mr. Burden, who was already working for Carson at the time Lacey was discharged, was on salary versus commission this saved money. Opp. at 21. However, respondent never proved what the differential, if any, was. Therefore, the contention is speculative. Moreover, Lacey admitted that Burden was a more experienced carpet salesman (J.A. 66-67). See Burdine, 450 U.S. at 256 (defendant must prove those he hired were better qualified). In fact, Burden was later fired for not achieving much beyond what Lacey had done. Executive Vice President McKinney was then terminated for the same reason and in the same manner as Lacey (J.A. 357-59).

recitation of the facts involved in this case and his own testimony that he was a great carpet salesman. However, the reason respondent was fired was because he did not meet Carson's sales goals for Pittsburgh, did not sell carpet to the large Pittsburgh commercial market, and refused to actively promote Carson's National Sales Program.

Respondent knew that Carson's sales goal for him was $1.8 million (J.A. 501) and conceded that he was so told (J.A. 204), but considered his objective "a joke".[5] He also admitted that his commercial carpet sales for Carson were very weak: "I just probably

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[5]Respondent devotes considerable time to discussing the alleged sales "quota" challenge which was given by Carson annually to all salesmen. The "quota" he cites is the company's annual sales contest which it is undisputed was established by Carson to spur on its sales force through fair peer competition (J.A. 338), by applying an even across the board percentage of the previous year's volume to each salesman (J.A. 61-63). It was not based on "real world" views of sales volume expected of the individual salesmen by Carson in a particular territory. (J.A. 501-07, 590-600, 677-81).

never put enough effort into it. That wasn't my bailiwick." (J.A. 200).

Finally, in the Spring of 1981, Carson discovered that Lacey was not following the National Sales Program he was ordered to follow, because he was "wasting his time" with department store managers like Patsy Macioce rather than spending his time with the retail store buyers, and that many of his accounts had not been serviced or contacted in a long time. (J.A. 303, 393, 537). Moreover, no commercial sales of any consequence were achieved by Lacey at the time of his termination. (J.A. 196-200, 521). His April 1981 volume was "far below the number expected" by management (J.A. 535) (less than half what should have been produced that month), and 41% below what he sold in April 1980 (J.A. 536-37, 794).

Carson knew that based on the Survey of Buying Power Index, Pl.Ex. 25A, Lacey's sales territory, Allegheny County, should have been producing at least $3.5 million in

carpet sales and that as a carpet salesman, Lacey should have been selling three times the $1.9 million the resilient floor salesman in Allegheny County was able to sell. Yet, Lacey was only able to sell $1.2 million in 1980 even while the Pittsburgh office construction boom was demanding large amounts of office carpet.[6]

The critical issue here for the Court to decide is whether the basis for a business decision by Carson, right or wrong on the facts, can be reviewed by a jury on

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[6]Lacey colors his performance at the Carson Regional office in relation to sales performance figures achieved by other personnel. Respondents' Pittsburgh territory was the only Metropolitan area in the Region and had more opportunities for sales than available to salesmen in rural regions. Therefore, he realistically had to do better than other salespersons in the home region. Moreover, the fact that Lacey's replacement, Mr. Burden, equaled Lacey's sales without having had years to develop the market as Lacey might have had, reflects that the market was not being aggressively pursued by Lacey. Lacey's objection that his boss, Frank Rodzwicz, was not fired at the moment Lacey was, also hides the fact that Rodzwicz was fired for the same reason as Lacey, poor performance, three months later.

evidence by the alleged victim of age discrimination that he was simply a good worker. Here, Carson's Executive Vice President McKinney testified he reluctantly made the decision to terminate Lacey on the basis of economic data, continuous losses of the Company in Lacey's territory, and the advice of his sales managers that they had exhausted efforts to motivate Lacey to perform at the level required by its national sales strategy.[7] (J.A. 355). None of these reasons made by the key individual, McKin-

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[7]Lacey argues he was not given a written warning according to Carson's policy. The unrebutted evidence was that the "policy" Lacey presented at trial was used only in Carson's retail stores division in Chicago, but not used in the division floor covering sales force. (J.A. 357, 693) No Carson floor covering employee ever received any of the appraisals or disciplinary devices set out for the larger and centrally organized retail workforce (J.A. 356-7, 693). Respondent cannot disclaim receiving a verbal ultimatum by his sales manager to achieve or be replaced. (J.A. 212, 216). To increase its market share, Carson experienced a large turnover in salesmen in Pittsburgh, most lasting only a few years, like Lacey. (J.A. 349-50, 367, 507).

ney, who made the decision to discharge were controverted as not the actual reasons relied upon at trial. Like the events in Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1425 (7th Cir. 1986), congratulatory notes and the winning of sales contests do not constitute evidence of sufficiently developing sales according to the duties required by management for the job.

Under the ADEA, respondent's position unfolds on Carson's stated reason that he "did not sell enough display rack and automatic sampling programs. Considering his overall sales performances, such an averment is shallow, even if true." Opp. at 22. Management at Carson is entitled to base its decision to discharge employees for failure to follow its sales program. A mistake as to the underlying facts of the decision does not transform the matter into a case of age discrimination. "Age must 'make a difference' between termination and retention." Cancellier v. Federated Dept. Stores, 672

F.2d 1312, 1316 (9th Cir. 1982), cert. denied, 459 U.S. 859 (1982).

Finally, Lacey contends that he tried to mitigate damages by subscribing to "two trade journals", and talking to "sources of whom he personally had knowledge . . . they didn't know anybody that was hiring anybody", but admits that he "finally abandoned his search" in 1983. (J.A. 109) (Opp. at 9). This grapevine approach set forth more fully in the Petition at 48-52 does not satisfy any reasonable search efforts established under NLRB v. Madison Courier, Inc., 505 F.2d 391, 395 (D.C. Cir. 1974). Lacey's further admission to the Court that he "abandoned his search for employment in 1983," Opp. at 10, at least three years before trial also fails to conform to this Court's enunciated policy to promote employment. Phelps Dodge Corp. v. NLRB, 313 U.S.

177, 200 (1941).[8]

As a life-long salesman, it is difficult to reconcile the alleged fact that between 1981 and the trial in 1986, there were no sales jobs (even outside the carpet industry) in Pittsburgh he might have been able to acquire if he had continued to look. His contemporary, Rodzwicz, obtained a sales position in the carpet industry shortly after he was terminated by Carson. At some point in time, Lacey was required to "lower his sights" in order to satisfy his affirmative duty to mitigate damages.[9] Abandonment

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[8]At footnote 7, Opp. at 27, respondent contends that Carson argued in the Third Circuit that no award of back pay or front pay after 1983 should have been awarded to Lacey. In Lacey's deposition before trial in 1983, read into evidence, he testified that he pursued no jobs after receiving social security benefits in July 1981 (J.A. 176-81). He also testified he made telephone calls to only four firms in 1981 (J.A. 194-95). At trial, he stated his search efforts ceased in 1983, and not 1981 (J.A. 174).

[9]Corroborative testimony was also introduced from two Social Security Administration personnel that Lacey had put in writing to the agency in February, 1981 that (continued...)

does not meet this test.

Finally, respondent has not disputed that a clear conflict in the circuits is presented between the present case concerning the award of front pay by the jury and the Second Circuit in Dominic v. Consolidated Edison Co., 822 F.2d 1249 (2d Cir. 1987), that front pay is an equitable matter reserved to the trial judge. Here, the trial judge made no finding that Lacey could not be reinstated, but he would have if Carson's jury instructions were accepted. In light of the inability of respondent to face the issue presented in the petition, the need for plenary review of the action below is indisputable.

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[9](...continued)
he "will retire 7/1/81" (J.A. 154). No person is asked to fill out a formal application for benefits if all they want to obtain is information on benefit levels (J.A. 409, 417). Lacey's request for extra time from Carson in March 1981 to keep his old car longer before purchasing a new one, as required by company policy, is also consistent with his intention to retire in July 1981 (J.A. 67-70).

CONCLUSION

The inevitability of this Court receiving litigation over the issues presented here will continue until the instant dispute under the ADEA is resolved. Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

Gerard C. Smetana*
Michael E. Avakian
Abramson & Fox
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

Attorneys for Appellant

*Counsel of Record

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OF COUNSEL:
Robert J. Kartholl, Jr.
Carson Pirie Scott & Co.
Division General Counsel
One South State Street
Chicago, Illinois 60603
(312) 641-8040